

37 Am. Jur. 2d Fraud and Deceit § 21

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Fraud and Deceit

George Blum, J.D., John Bourdeau, J.D., Romualdo P. Eclavea, J.D., Janice Holben, J.D., Karl Oakes, J.D. and Eric C. Surette, J.D.

II. Elements and Requisites

A. Basis of Action

1. In General

§ 21. Tort action based upon fraud; deceit

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  1 to 7, 26

The grounds for a tort action based upon fraud—action of deceit—are fraud and damage,¹ and when both concur, the action will lie.² Indeed, both must concur to constitute actionable fraud,³ a common statement of the rule being that neither fraud without damage nor damage without fraud is sufficient to support an action.⁴

Observation:

Under Puerto Rico law, a fraud affecting a contracting party is known as “dolo” or deceit,⁵ and a party alleging “dolo,” or contractual fraud, must demonstrate: (1) a false representation by the defendant; (2) the plaintiff’s reasonable and foreseeable reliance thereon; (3) injury to the plaintiff as a result of the reliance; and (4) an intent to defraud.⁶

The torts of tortious interference with contract and fraud define distinct wrongs and have no elements in common.⁷

CUMULATIVE SUPPLEMENT

Cases:

Time and labor employees of Port Authority of New York and New Jersey expended in connection with scheme in which defendants, a Port Authority official and New Jersey Governor's Deputy Chief of Staff, sought to impose traffic gridlock in city to punish its mayor for refusing to endorse Governor's reelection bid by reallocating city's access lanes to bridge administered by Port Authority, under guise of conducting a traffic study, were just the implementation costs of defendants scheme, and thus could not support defendants' convictions under federal wire fraud and federal-program fraud statutes; neither defendant sought to obtain services provided by the employees, who were back-up toll collectors and traffic engineers who collected data for the sham study. 18 U.S.C.A. §§ 666(a)(1)(A), 1343. *Kelly v. United States*, 140 S. Ct. 1565 (2020).

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Footnotes

- ¹ *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 71 S. Ct. 692, 95 L. Ed. 912 (1951); *Record v. Rochester Trust Co.*, 89 N.H. 1, 192 A. 177, 110 A.L.R. 1218 (1937).
- ² *Scott v. McWilliams*, 60 S.W.2d 491 (Tex. Civ. App. El Paso 1933), writ dismissed; *Gollon v. Jackson Mill. Co.*, 224 Wis. 618, 273 N.W. 59, 110 A.L.R. 1173 (1937).
- ³ *Abernathy v. Brashear*, 48 S.W.2d 393 (Tex. Civ. App. Amarillo 1932); *Cameron v. Cameron*, 111 W. Va. 375, 162 S.E. 173 (1931).
- ⁴ *Racanati v. Black Diamond Stevedoring Co.*, 130 N.J.L. 261, 32 A.2d 578 (N.J. Sup. Ct. 1943), judgment aff'd, 132 N.J.L. 250, 39 A.2d 91 (N.J. Ct. Err. & App. 1944).
- ⁵ *P.C.M.E. Commercial, S.E. v. Pace Membership Warehouse, Inc.*, 952 F. Supp. 84 (D.P.R. 1997).
- ⁶ *Portugues-Santana v. Rekomdiv Intern.*, 657 F.3d 56 (1st Cir. 2011); *Puerto Rico Elec. Power Authority v. Action Refund*, 515 F.3d 57 (1st Cir. 2008).
- ⁷ *Preferred RX, Inc. v. American Prescription Plan, Inc.*, 46 F.3d 535, 1995 FED App. 0046P (6th Cir. 1995) (applying Ohio law).

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II. Elements and Requisites

A. Basis of Action

2. Essential Elements of Action

§ 22. Generally; requirement that all elements be present

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West's Key Number Digest

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Generally, all of the stated ingredients for a cause of action in fraud,¹ deceit,² or a related action,³ except for a few variants from the common law rules in force in some jurisdictions, must be found to exist, and the absence of any one of them is fatal to a recovery,⁴ although under the rulings of some courts, the rule is greatly relaxed as to knowledge and intent where the relief sought is in equity.⁵ Thus, the failure to prove any element of fraud or misrepresentation is fatal to the claim.⁶

A common law fraudulent deception must be actually false, known to be false by the perpetrator, and reasonably relied upon by a victim who incurs damages.⁷

CUMULATIVE SUPPLEMENT

Cases:

Under District of Columbia law, the essential elements of fraud are: (1) a false representation; (2) concerning a material fact; (3) made with knowledge of its falsity; (4) with the intent to deceive; and (5) upon which reliance is placed. [Bank of New York Mellon Trust Co. N.A. v. Henderson](#), 107 F. Supp. 3d 41 (D.D.C. 2015).

To establish fraud under Maryland law, the plaintiff must show that: (1) the defendant made a false representation to the plaintiff, (2) the falsity of the representation was either known to the defendant or the representation was made with reckless indifference to its truth, (3) the misrepresentation was made for the purposes of defrauding the plaintiff, (4) the plaintiff relied on the misrepresentation and had the right to rely on it, and (5) the plaintiff suffered compensable injury as a result of the misrepresentation. [Belyakov v. Medical Science & Computing](#), 86 F. Supp. 3d 430 (D. Md. 2015).

To prove that a defendant breached a contract by committing fraud under Michigan law, plaintiff must show (1) that defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth, and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. [Bowlers' Alley, Inc. v. Cincinnati Ins. Co.](#), 108 F. Supp. 3d 543 (E.D. Mich. 2015).

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Footnotes

¹ § 24.

² § 23.

³ §§ 26 to 30.

⁴ [North Texas Production Credit Ass'n v. McCurtain County Nat. Bank](#), 222 F.3d 800, 42 U.C.C. Rep. Serv. 2d 888 (10th Cir. 2000) (applying Oklahoma law); [Gallagher v. Viking Supply Corp.](#), 3 Ariz. App. 55, 411 P.2d 814, 15 A.L.R.3d 1 (1966).

⁵ §§ 134, 135.

⁶ [Austin v. Stokes-Craven Holding Corp.](#), 387 S.C. 22, 691 S.E.2d 135 (2010).

⁷ [In re Tobacco II Cases](#), 46 Cal. 4th 298, 93 Cal. Rptr. 3d 559, 207 P.3d 20 (2009).

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II. Elements and Requisites

A. Basis of Action

2. Essential Elements of Action

§ 23. Action for deceit

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

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The essential elements required to sustain an action for deceit are that a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else recklessly made; that it was made with intent to deceive and for the purpose of inducing the other party to act upon it; and that the other party did in fact rely on it and was induced thereby to act to his or her injury or damage.¹ To sustain a cause of action based on deceit, the defendant must have made a false representation to the person defrauded.² A tort action for deceit requires showing an intent to deceive or scienter, which are heavy burdens of proof.³

Observation:

Under the formulation of the rule as stated in the Restatement Second of Torts, one who fraudulently makes a misrepresentation of fact, opinion, intention, or law for the purpose of inducing another to act or to refrain from action in reliance upon it is subject to liability to the other in deceit for pecuniary loss caused to him or her by his or her justifiable reliance upon the misrepresentation.⁴

The deceit statute in some jurisdiction provides a cause of action for plaintiffs who have been “willfully deceive[d]” by another and who have altered their positions based on the deceit.⁵

Footnotes

- ¹ Charpentier v. Los Angeles Rams Football Co., Inc., 75 Cal. App. 4th 301, 89 Cal. Rptr. 2d 115 (4th Dist. 1999); Shrives v. Talbot, 91 Idaho 338, 421 P.2d 133 (1966); Jo Ann Homes at Bellmore, Inc. v. Dworetz, 25 N.Y.2d 112, 302 N.Y.S.2d 799, 250 N.E.2d 214 (1969); North American Truck & Trailer, Inc. v. M.C.I. Communication Services, Inc., 2008 SD 45, 751 N.W.2d 710 (S.D. 2008).
- ² Gourdine v. Crews, 405 Md. 722, 955 A.2d 769 (2008).
- ³ Media Network, Inc. v. Long Haymes Carr, Inc., 197 N.C. App. 433, 678 S.E.2d 671 (2009).
- ⁴ Restatement Second, Torts § 525.
LHC Nashua Partnership, Ltd. v. PDNED Sagamore Nashua, L.L.C., 659 F.3d 450 (5th Cir. 2011).
- ⁵ Kent v. United of Omaha Life Ins. Co., 484 F.3d 988 (8th Cir. 2007) (applying South Dakota law).

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II. Elements and Requisites


A. Basis of Action

2. Essential Elements of Action

§ 24. Action for fraud

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West's Key Number Digest

West's Key Number Digest, [Fraud](#)  3 to 4.5, 26

A.L.R. Library

[Enforceability of Trial Period Plans \(TPP\) Under the Home Affordable Modification Program \(HAMP\)](#), 88 A.L.R. Fed. 2d 331

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 207](#) (Instructions to jury—Elements of fraud—General form)

Law Reviews and Other Periodicals

Arger and Natarelli, [Support for Dismissal of State Law Based HAMP TPP Cases](#), 2013-JAN Bus. L. Today 1 (2013)

Axelsson and Hutchings, [Mortgage Servicing Developments](#), 68 Bus. Law. 571 (2013)

Chiles and Mitchell, [HAMP: An Overview of the Program and Recent Litigation Trends](#), 65 Consumer Fin. L.Q. Rep. 194 (2011)

Dyer, [Trial Period Plan Creates Mortgage Modification](#), 17 J. Consumer & Com. L. 31 (2013)

Hawes, [Forcing Lenders to Comply with the Home Affordable Modification Program](#), 101 Ill. B.J. 308 (2013)
Jacobs, [Help or HAMP\(Er\)?—The Courts’ Reluctance to Provide the Right to a Private Action under HAMP and its Detrimental Effect on Homeowners](#), 47 Val. U. L. Rev. 267 (2012)
Maxwell, [The 75 Billion Dollar Question: Why is HAMP Not An Entitlement Program?](#), 97 Iowa L. Rev. 1305 (2012)
Parker, [Mending Broken Promises: Allowing Homeowners to Pursue Claims of Promissory Estoppel Against Lenders When Denied Loan Modifications](#), 47 New Eng. L. Rev. 985 (2013)
Sarapinian, [Fighting Foreclosure: Using Contract Law to Enforce the Home Affordable Modification Program](#), 64 Hastings L.J. 905 (2013)

The five traditional elements of fraud, each of which must be established by evidence that is not equally consistent with either honesty or deceit include: (1) a false representation; (2) in reference to a material fact; (3) made with knowledge of its falsity; (4) with the intent to deceive; and (5) on which an action is taken in justifiable reliance upon the representation.¹

To establish a claim for fraud, a plaintiff must show by clear and convincing evidence that the defendant made a false representation of a material fact with knowledge of its falsity, for the purpose of inducing the plaintiff to act thereon, and that the plaintiff reasonably relied upon the representation as true and acted upon it to his or her damage.²

Fraud cannot be predicated upon mistake or negligence, no matter how gross.³

A party’s intent is determined at the time the party made the representation; however, a party’s intent may be inferred by the party’s subsequent acts following the representation.⁴ While an honest, good-faith belief in the truth of a misrepresentation may negate an intent to defraud, a good-faith belief that the victim will be repaid and will sustain no loss is no defense at all;⁵ the intent to repay eventually is irrelevant to the question of guilt for fraud.⁶

Observation:

A cause of action for fraud cannot lie where the plaintiff willingly permits the defendant to deceive the plaintiff.⁷

Practice Tip:

To establish the affirmative defense of fraud, the government must prove by clear and convincing evidence: (1) a misrepresentation of a material fact; (2) knowledge and intent to deceive or a reckless state of mind; (3) justifiable reliance on the misrepresentation by the government; and (4) injury to the government.⁸

CUMULATIVE SUPPLEMENT

Cases:

In order to maintain an action for fraud under Arizona law, a plaintiff must sufficiently plead: (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) the speaker's intent that it be acted upon by the recipient in the manner reasonably calculated, (6) the hearer's ignorance of its falsity, (7) the hearer's reliance on its truth, (8) the right to rely on it, and (9) a consequent and proximate injury. [Seikaly & Stewart, P.C. v. Fairley](#), 18 F. Supp. 3d 989 (D. Ariz. 2014).

Under Alabama law, the elements of a prima facie fraud claim are that plaintiff must demonstrate: (1) a misrepresentation of a material fact; (2) made willfully to deceive, recklessly, without knowledge, or mistakenly; (3) that was reasonably relied on by the plaintiff under the circumstances; and (4) caused damage as a proximate consequence. [San Francisco Residence Club, Inc. v. Baswell-Guthrie](#), 897 F. Supp. 2d 1122 (N.D. Ala. 2012).

Pursuant to District of Columbia Law, fraud requires: (1) a false representation, (2) in reference to a material fact, (3) made with knowledge of its falsity, (4) with the intent to deceive, and (5) action taken in reliance upon the representation, (6) which consequently resulted in provable damages. [Council on American-Islamic Relations Action Network, Inc. v. Gaubatz](#), 82 F. Supp. 3d 344 (D.D.C. 2015).

Under Indiana law, the essential elements of common law fraud are: (1) a material representation of past or existing facts which; (2) was false; (3) was made with knowledge or reckless ignorance of its falsity; (4) was made with intent to deceive; (5) was rightfully relied upon by complaining party; and (6) proximately caused injury to complaining party. [Kruse v. GS Pep Technology Fund 2000 LP](#), 897 F. Supp. 2d 769 (N.D. Ind. 2012).

Under Maryland law, to state fraud claim, plaintiff must allege with particularity that: (1) defendant made false statement of fact; (2) defendant knew statement was false or acted with reckless disregard for its truth; (3) defendant made statement for purpose of defrauding plaintiff; (4) plaintiff reasonably relied on false statement, and (5) plaintiff was damaged as result. [Roberson v. Ginnie Mae REMIC Trust 2010 H01](#), 973 F. Supp. 2d 585 (D. Md. 2013).

In Massachusetts, a claim for fraud requires the plaintiff to show that (1) the defendant made a false representation of material fact, (2) with knowledge of its falsity, (3) for the purpose of inducing the plaintiff to act in reliance thereon, (4) the plaintiff relied upon the representation, and (5) the plaintiff acted to his detriment. [Fiorillo v. Winiker](#), 85 F. Supp. 3d 565 (D. Mass. 2015).

In order to establish a cause of action for fraud in Massachusetts, a plaintiff must demonstrate that: (1) the defendant made a false representation of material fact, (2) with knowledge of its falsity, (3) for the purpose of inducing the plaintiff to act in reliance thereon, (4) the plaintiff relied upon the representation, and (5) the plaintiff acted to his detriment. [America's Growth Capital, LLC v. PFIP, LLC](#), 73 F. Supp. 3d 127 (D. Mass. 2014), appeal dismissed, (1st Cir. 15-1432)(June 3, 2015).

To state claim of fraud under Michigan law, plaintiffs must plead facts showing that: (1) defendant made material representation; (2) it was false; (3) when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth, and as positive assertion; (4) he made it with intention that it should be acted upon by plaintiff; (5) plaintiff acted in reliance upon it; and (6) he thereby suffered injury. [PNC Bank, Nat. Ass'n v. Goyette Mechanical Co., Inc.](#), 88 F. Supp. 3d 775 (E.D. Mich. 2015).

To state a claim for fraud under Minnesota law, plaintiff must allege: (1) a false representation by defendant of a past or existing material fact susceptible of knowledge; (2) made with knowledge of the falsity of the representation or made without knowing whether it was true or false; (3) with the intention to induce plaintiff to act in reliance thereon; (4) that the representation caused plaintiff to act in reliance thereon; and (5) that plaintiff suffered pecuniary damages as a result of the reliance. [Zimmerschied v. JP Morgan Chase Bank, N.A.](#), 49 F. Supp. 3d 583 (D. Minn. 2014).

To prevail on a fraud claim in Ohio, a plaintiff must prove these elements: (1) a representation; (2) material to the transaction; (3) made falsely, with knowledge of falsity; and (4) with the intention of misleading another into relying on it; and he or she also must prove (5) justifiable reliance on the representation; and (6) an injury proximately caused by said reliance. [Schumacher v. State Automobile Mut. Ins. Co.](#), 47 F. Supp. 3d 618 (S.D. Ohio 2014).

To state a claim of actual fraud under Virginia law, a plaintiff must demonstrate: (1) a false representation by the defendant;

(2) of a material fact; (3) made intentionally; (4) with intent to mislead; (5) reliance by the party misled; and (6) resulting damage to the party misled. [William v. AES Corp.](#), 28 F. Supp. 3d 553 (E.D. Va. 2014).

The five elements of a fraud claim are: (1) false representation made by defendant; (2) scienter; (3) intention to induce plaintiff to act or refrain from acting in reliance by plaintiff; (4) justifiable reliance by plaintiff; and (5) damage to plaintiff. [Alvear v. Sandy Springs Toyota, Inc.](#), 332 Ga. App. 798, 775 S.E.2d 172 (2015).

Fraud requires five essential elements: false representation, scienter, inducement, reliance, and injury resulting from reliance on the false representation. West's [Ga.Code Ann. § 9–11–9\(b\)](#). [Cox v. Bank of America, N.A.](#), 742 S.E.2d 147 (Ga. Ct. App. 2013).

For a fraud claim to succeed, a plaintiff must establish nine elements with particularity: (1) statement or a representation of fact, (2) its falsity, (3) its materiality, (4) speaker's knowledge of its falsity, (5) speaker's intent that there be reliance, (6) hearer's ignorance of the falsity of the statement, (7) reliance by the hearer, (8) justifiable reliance, and (9) resultant injury. [Bank of Commerce v. Jefferson Enterprises, LLC](#), 303 P.3d 183 (Idaho 2013).

The elements of a common-law fraud claim when based on a real estate sales disclosure form distill down to (1) a false representation of past or existing facts on the Form, (2) made with actual knowledge of its falsity, (3) which proximately caused the complaining party injury. [Wysocki v. Johnson](#), 18 N.E.3d 600 (Ind. 2014).

To recover for fraud, a plaintiff must prove: (1) a representation, (2) its falsity; (3) its materiality, (4) the speaker's knowledge of its falsity, (5) his intent that it should be acted on by the hearer and in the manner reasonably contemplated, (6) the hearer's ignorance of its falsity, (7) his reliance on its truth, (8) his right to rely thereon, and (9) his consequent and proximate injury. [Brothers v. Winstead](#), 129 So. 3d 906 (Miss. 2014).

The elements of fraud require (1) a representation or, where there is a duty to disclose, concealment of a fact, (2) which is material to the transaction at hand, (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (4) with the intent of misleading another into relying upon it, (5) justifiable reliance upon the representation or concealment, and (6) a resulting injury proximately caused by the reliance. [Snapp v. Castlebrook Builders, Inc.](#), 2014-Ohio-163, 7 N.E.3d 574 (Ohio Ct. App. 3d Dist. Shelby County 2014).

The essential elements in an action for fraud are: (1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied on it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied on it. [Sneberger v. Morrison](#), 776 S.E.2d 156 (W. Va. 2015).

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Footnotes

¹ [Little Caesar Enterprises, Inc. v. OPPCO, LLC](#), 219 F.3d 547, 2000 FED App. 0229P (6th Cir. 2000) (applying Michigan law); [Fowler v. SmithKline Beecham Clinical Laboratories, Inc.](#), 225 F.3d 1013 (8th Cir. 2000) (applying Arkansas law); [North Texas Production Credit Ass'n v. McCurtain County Nat. Bank](#), 222 F.3d 800, 42 U.C.C. Rep. Serv. 2d 888 (10th Cir. 2000) (applying Oklahoma law); [Paper, Allied, Chemical and Energy Workers Intern. Union, Local 5-508, AFL—CIO v. Slurry Explosive Corp.](#), 107 F. Supp. 2d 1311 (D. Kan. 2000) (applying Kansas law); [Lapides v. Trabbic](#), 134 Md. App. 51, 758 A.2d 1114 (2000).

² [Taylor v. American Chemistry Council](#), 576 F.3d 16 (1st Cir. 2009) (applying Massachusetts law); [Hinesley v. Oakshade Town Center](#), 135 Cal. App. 4th 289, 37 Cal. Rptr. 3d 364 (3d Dist. 2005); [TechBios, Inc. v. Champagne](#), 301 Ga. App. 592, 688 S.E.2d 378 (2009); [Wheatcraft v. Wheatcraft](#), 825 N.E.2d 23 (Ind. Ct. App. 2005); [Eurycleia Partners, LP v. Seward & Kissel, LLP](#), 12 N.Y.3d 553, 883 N.Y.S.2d 147, 910 N.E.2d 976 (2009); [Business Staffing, Inc. v. Jackson Hot Oil Service](#), 2012 WL 2627533 (Tex. App. El Paso 2012), review denied, (Oct. 12, 2012); [Estate](#)

of Alden v. Dee, 190 Vt. 401, 2011 VT 64, 35 A.3d 950 (2011); Sales v. Kecoughtan Housing Co., Ltd., 279 Va. 475, 690 S.E.2d 91 (2010); Bowens v. Allied Warehousing Services, Inc., 229 W. Va. 523, 729 S.E.2d 845 (2012); Garrison v. CC Builders, Inc., 2008 WY 34, 179 P.3d 867 (Wyo. 2008).

³ Terrebonne Concrete, LLC v. CEC Enterprises, LLC, 76 So. 3d 502 (La. Ct. App. 1st Cir. 2011), writ denied, 75 So. 3d 464 (La. 2011); Anglin v. Anglin, 30 So. 3d 746 (La. Ct. App. 1st Cir. 2009).

⁴ Arete Partners, L.P. v. Gunnerman, 594 F.3d 390 (5th Cir. 2010) (applying Texas law); Aquaplex, Inc. v. Rancho La Valencia, Inc., 297 S.W.3d 768 (Tex. 2009).

⁵ Tijani v. Holder, 628 F.3d 1071 (9th Cir. 2010), cert. denied, 131 S. Ct. 2160, 179 L. Ed. 2d 943 (2011).

⁶ U.S. v. Curry, 461 F.3d 452 (4th Cir. 2006).

⁷ Hanners v. Balfour Guthrie, Inc., 564 So. 2d 412 (Ala. 1990).

⁸ Long Island Sav. Bank, FSB v. U.S., 54 Fed. Cl. 607 (2002), rev'd on other grounds, 503 F.3d 1234 (Fed. Cir. 2007).

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37 Am. Jur. 2d Fraud and Deceit § 25

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II. Elements and Requisites

A. Basis of Action

2. Essential Elements of Action

§ 25. Action for constructive fraud

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West's Key Number Digest

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Constructive fraud requires a fiduciary or confidential relationship, a breach of duty by the person in the confidential or fiduciary relationship, and that the person in breach accepted the fruits of the fraud¹ or induced justifiable reliance by the other to his or her detriment.² Constructive fraud does not require a showing of an intent to deceive³ or an intent to defraud.⁴ Constructive fraud does not require proof of fraudulent intent since the law indulges in an assumption of fraud for the protection of valuable social interests based upon an enforced concept of confidence both public and private.⁵ Also, the gist of a constructive fraud finding is to avoid the need to prove intent, that is, knowledge of falsity or intent to induce reliance since it is inferred directly from the relationship and the breach.⁶

To establish a claim for constructive fraud, the plaintiff must show: (1) the existence of a duty due to a relationship between the parties; (2) violation of the duty by making deceptive material representations of past or existing facts or remaining silent when a duty to speak exists; (3) reliance thereon by the complaining party; (4) injury to the complaining party proximately caused thereby; and (5) the gaining of an advantage by the party to be charged at the expense of the complaining party.⁷ A plaintiff can also establish constructive fraud by showing facts and circumstances creating a relation of trust and confidence, which surrounded the consummation of the transaction in which the defendant is alleged to have taken advantage of the relationship and that the defendant sought to benefit himself or herself in the transaction.⁸ To prevail on a constructive fraud claim, a plaintiff must show by clear and convincing evidence that the defendant negligently or innocently made a false representation of material fact and that the plaintiff suffered damage as a result of his or her reliance upon that misrepresentation.⁹ Other courts state that the elements of a constructive fraud claim are the same as those for actual fraud, except that if the defendant stood in a fiduciary or confidential relationship with the plaintiff, there is no requirement that the plaintiff establish the defendant's scienter, that is, his or her knowledge of the falsity of the representation.¹⁰

In some jurisdictions, constructive fraud will not lie where the parties are dealing at arm's length because there is no duty imposed on either party to protect or benefit the other.¹¹

No showing of undue influence is required to support a constructive fraud claim.¹²

CUMULATIVE SUPPLEMENT

Cases:

Under District of Columbia law, constructive fraud includes all the same elements as actual fraud, except the intent to deceive. [Himmelstein v. Comcast of the Dist., L.L.C.](#), 908 F. Supp. 2d 49 (D.D.C. 2012).

Under Tennessee law, a claim of constructive fraud requires similar detail as that of general fraud, except plaintiff need not identify an intent to deceive or dishonesty of purpose. [Fed.Rules Civ.Proc.Rules 8\(a\), 9\(b\)](#), 28 U.S.C.A. [Croteau v. National Better Living Ass'n, Inc.](#), 2013 WL 3030629 (D. Mont. 2013).

Local governments sufficiently alleged constructive fraud claim against companies that provided telephone service to consumers and were required to collect and remit to county and town charges to fund emergency call centers under South Carolina's 911 Act, by alleging that companies knew or should have known that their monthly remittance checks misstated the appropriate amount charged, collected, and remitted to local governments. [S.C. Code Ann. § 23-47-50\(A\)](#). [County of Dorchester, South Carolina v. AT & T Corp.](#), 407 F. Supp. 3d 561 (D.S.C. 2019).

In order to maintain claim for constructive fraud, plaintiffs must show that they and defendants were in a relation of trust and confidence that led up to and surrounded consummation of transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff. [Brissett v. First Mount Vernon Indus. Loan Ass'n](#), 756 S.E.2d 798 (N.C. Ct. App. 2014).

Constructive fraud may be: 1) based on a negligent misrepresentation or an innocent misrepresentation where there is an underlying right to be correctly informed of the facts, 2) based on the silence by one who has a duty to speak, or 3) invoked to prevent harm or to extend protection to recognized public interests. [Croslin v. Enerlex, Inc.](#), 2013 OK 34, 308 P.3d 1041 (Okla. 2013).

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Footnotes

¹ [Joyce v. Morgan Stanley & Co., Inc.](#), 538 F.3d 797 (7th Cir. 2008) (applying Illinois law).

² [Green v. Lisa Frank, Inc.](#), 221 Ariz. 138, 211 P.3d 16 (Ct. App. Div. 2 2009).

³ [Specialty Beverages, L.L.C. v. Pabst Brewing Co.](#), 537 F.3d 1165, 71 Fed. R. Serv. 3d 490, 66 U.C.C. Rep. Serv. 2d 643 (10th Cir. 2008) (applying Oklahoma law); [Green v. Lisa Frank, Inc.](#), 221 Ariz. 138, 211 P.3d 16 (Ct. App. Div. 2 2009); [Lawyers Title Ins. Corp. v. New Freedom Mortg. Corp.](#), 285 Ga. App. 22, 645 S.E.2d 536 (2007); [Estate of Draper v. Bank of America, N.A.](#), 288 Kan. 510, 205 P.3d 698 (2009); [Town of Geraldine v. Montana Mun. Ins. Authority](#), 2008 MT 411, 347 Mont. 267, 198 P.3d 796 (2008); [Eggleston v. Kovacich](#), 274 Neb. 579, 742 N.W.2d 471 (2007); [Sears v. First Pioneer Farm Credit, ACA](#), 46 A.D.3d 1282, 850 N.Y.S.2d 219 (3d Dep't 2007); [Forbis v. Neal](#), 361 N.C. 519, 649 S.E.2d 382 (2007); [Armstrong v. Collins](#), 366 S.C. 204, 621 S.E.2d 368 (Ct. App. 2005); [Kincaid v. SouthTrust Bank](#), 221 S.W.3d 32 (Tenn. Ct. App. 2006).

⁴ [Mindys Cosmetics, Inc. v. Dakar](#), 611 F.3d 590 (9th Cir. 2010) (applying California law); [Greco v. Greco](#), 2008 WL 4056328 (Tex. App. San Antonio 2008).

⁵ [Camp St. Mary's Assn. of W. Ohio Conference of the United Methodist Church, Inc. v. Otterbein Homes](#), 176 Ohio

App. 3d 54, 2008-Ohio-1490, 889 N.E.2d 1066 (3d Dist. Auglaize County 2008).

6 Gray v. Tri-Way Const. Services, Inc., 147 Idaho 378, 210 P.3d 63 (2009).

7 Barnett v. Elite Properties of America, Inc., 252 P.3d 14 (Colo. App. 2010), cert. denied, 2010 WL 4159679 (Colo. 2010); Fiederlein v. Boutselis, 952 N.E.2d 847 (Ind. Ct. App. 2011).

8 Shoaf v. Shoaf, 727 S.E.2d 301 (N.C. Ct. App. 2012).

9 Supervalu, Inc. v. Johnson, 276 Va. 356, 666 S.E.2d 335 (2008).

10 Schweizer v. Mulvehill, 93 F. Supp. 2d 376 (S.D. N.Y. 2000) (applying New York law); Klembczyk v. Di Nardo, 265 A.D.2d 934, 705 N.Y.S.2d 743 (4th Dep't 1999).

11 American Honda Motor Co., Inc. v. Motorcycle Information Network, Inc., 390 F. Supp. 2d 1170 (M.D. Fla. 2005) (applying Florida law).

12 Demming v. Underwood, 943 N.E.2d 878 (Ind. Ct. App. 2011), transfer denied, 962 N.E.2d 647 (Ind. 2011).

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37 Am. Jur. 2d Fraud and Deceit § 26

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Fraud and Deceit

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II. Elements and Requisites

A. Basis of Action

2. Essential Elements of Action

§ 26. Misrepresentation

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  1 to 7, 26

Misrepresentation is generally defined as a falsehood or untruth made with the intent of deceit rather than inadvertent mistake.¹ To establish a misrepresentation claim, a plaintiff must prove: (1) the defendant made a representation; (2) the representation was false; (3) the representation related to a past or present fact; (4) the fact was material; (5) the fact was susceptible of knowledge; (6) the defendant either knew that the fact was false or asserted it as knowledge without knowing whether it was true or false; (7) the defendant intended the representation to induce the plaintiff to act or be justified in acting upon it; (8) the representation justifiably induced the plaintiff to act on it; (9) the plaintiff acted in reliance upon the representation; (10) the plaintiff suffered damage; and (11) the false statement proximately caused the plaintiff's injury.² A misrepresentation, which is a false or misleading statement that induces the recipient to act or refrain from acting, is actionable when it is made either with knowledge of its untruth, or recklessly and willfully without regard to its consequences, and with an intent to mislead and deceive the plaintiff.³ To prevail on a claim for misrepresentation, a plaintiff must establish that the act claimed to be fraudulent was the act of the defendant; that it was material and false; that the plaintiff relied on it and was justified under the circumstances in relying upon it; and that the plaintiff was damaged because he or she relied on it.⁴ For purposes of the requirement that the alleged misrepresentation cause the plaintiff's loss to be actionable as fraud, "cause" means legal or proximate cause, which consists of a finding of causation in fact or, in other words, substantial cause and the absence of a public policy rule of law which prohibits the imposition of liability.⁵

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Footnotes

¹ [Kerwin v. Missouri Dental Bd.](#), 375 S.W.3d 219 (Mo. Ct. App. W.D. 2012), reh'g and/or transfer denied, (July 31, 2012); [Webb v. Stockford](#), 331 S.W.3d 169 (Tex. App. Dallas 2011), review denied, (Aug. 19, 2011).

² [McLain v. Andersen Corp.](#), 567 F.3d 956 (8th Cir. 2009) (applying Minnesota law).

³ Brodeur v. American Home Assur. Co., 169 P.3d 139 (Colo. 2007).

⁴ Jennings v. Farmers Mut. Ins. Co., 224 W. Va. 636, 687 S.E.2d 574 (2009).

⁵ Flegles, Inc. v. TruServ Corp., 289 S.W.3d 544 (Ky. 2009).

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37 Am. Jur. 2d Fraud and Deceit § 27

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II. Elements and Requisites

A. Basis of Action

2. Essential Elements of Action

§ 27. Misrepresentation—Fraudulent misrepresentation

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West's Key Number Digest

West's Key Number Digest, [Fraud](#)  1 to 7, 26

Under the law of some jurisdictions, fraud encompasses, among other things, the theories of fraudulent misrepresentation and fraudulent concealment.¹ The basis of fraudulent misrepresentation is the creation of a false impression and damage sustained as a natural and probable consequence of the act charged.² Generally, in a claim of fraudulent misrepresentation, a plaintiff must prove that the defendant made a false representation of a material fact with knowledge of its falsity; the representation related to a past or present fact; the defendant intended the representation to induce the plaintiff to act or be justified in acting upon it; the plaintiff acted in reliance upon the representation to his or her detriment; the plaintiff's reliance was reasonable under the circumstances; and the false statement proximately caused the plaintiff's injury.³ To recover in a tort action for fraudulent misrepresentation, the plaintiff must prove that the defendant made a false representation of a material fact; that its falsity was either known to the defendant or that the representation was made with such reckless indifference to the truth as to be the equivalent to actual knowledge of its falsity; that the representation was made with intent that the plaintiff act on it; that the plaintiff was ignorant of the falsity of the representation; that the plaintiff not only relied on the representation but had a right to rely on it and would not have done the thing from which the injury arose had the misrepresentation not been made; and that the plaintiff actually suffered damage directly resulting from the misrepresentation.⁴ To state a claim for fraudulent misrepresentation, a plaintiff must allege that the defendant's misrepresentation was made with the intent or knowledge that it would be communicated to the plaintiff with the intent to deceive him or her.⁵ Under the law regarding fraudulent misrepresentation, the fraud element is proved when it is shown that a false representation was made knowingly, or in conscious ignorance of the truth, or recklessly without caring whether it be true or false.⁶

Observation:

A plaintiff may not recover against an accountant for fraudulent misrepresentations made to a third party where the third party did not communicate those misrepresentations to the plaintiff, even if the defendant knew that the third party was required to communicate any negative information to the plaintiff, and the plaintiff relied to his or her detriment on the absence of any such

communication.⁷

Practice Tip:

Fraudulent misrepresentation is an intentional tort,⁸ and like other intentional torts, recovery is not necessarily barred by the fault of the plaintiff that contributed to the damage.⁹

CUMULATIVE SUPPLEMENT

Cases:

Under Michigan law, a claim of fraudulent misrepresentation requires proof of six elements: (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without any knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. [Bushman v. American Title Co. of Washtenaw](#), 101 F. Supp. 3d 714 (E.D. Mich. 2015).

In order for a plaintiff to prevail on a claim of fraudulent misrepresentation, he or she must establish the following elements: (1) a false statement of material fact; (2) known or believed to be false by the person making it; (3) an intent to induce the plaintiff to act; (4) action by the plaintiff in justifiable reliance on the truth of the statement; and (5) damage to the plaintiff resulting from such reliance. [Certain Underwriters at Lloyd's, London v. Abbott Laboratories](#), 2014 IL App (1st) 132020, 384 Ill. Dec. 354, 16 N.E.3d 747 (App. Ct. 1st Dist. 2014).

A misrepresentation in order to constitute a fraud must consist of a statement of material fact, false and known to be so by the party making it, made to induce the other party to act, and, in acting, the other party must rely on the truth of the statement. [Bangaly v. Baggiani](#), 2014 IL App (1st) 123760, 386 Ill. Dec. 181, 20 N.E.3d 42 (App. Ct. 1st Dist. 2014).

The elements of fraudulent inducement are: (1) defendant made false representations as a statement of existing and material fact, (2) defendant knew the representations to be false or made them recklessly without knowledge concerning them, (3) defendant made the representations intentionally for the purpose of inducing another party to act upon them, (4) the other party reasonably relied and acted upon the representations, (5) the other party sustained damages by relying upon the representations. [Stechschulte v. Jennings](#), 298 P.3d 1083 (Kan. 2013).

"Common-law fraud" or "fraudulent misrepresentation" entails a defendant making a false representation of material fact with the intention that the plaintiff would rely on it, the defendant either knowing at the time that the representation was false or making it with reckless disregard for its accuracy, and the plaintiff actually relying on the representation and suffering damage as a result. [Barclae v. Zarb](#), 300 Mich. App. 455, 834 N.W.2d 100 (2013).

A tort action for fraud requires a contract between the parties, a misrepresentation of facts, suppression of facts, misleading another, or promising without an intent to perform, reliance on the false or misleading representation, and proof of actual damages proximately caused by the misrepresentation or nondisclosure. [NDCC 9-03-08. Northstar Founders, LLC v. Hayden Capital USA, LLC](#), 2014 ND 200, 2014 WL 5487557 (N.D. 2014).

Elements which constitute the basis for a claim of fraudulent misrepresentation are: (1) a representation, or where there is a duty to disclose, concealment of a fact, (2) which is material to the transaction at hand, (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (4) with the intent of misleading another into relying on it, (5) justifiable reliance upon the representation or concealment, and (6) a resulting injury proximately caused by the reliance. [Buchanan v. Improved Properties, LLC, 2014-Ohio-263, 7 N.E.3d 634](#) (Ohio Ct. App. 3d Dist. Allen County 2014).

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Footnotes

- ¹ [Iverson v. Johnson Gas Appliance Co., 172 F.3d 524 \(8th Cir. 1999\) \(applying Minnesota law\).](#)
- ² [F.D.I.C. v. Hamilton, 122 F.3d 854 \(10th Cir. 1997\) \(applying Oklahoma law\).](#)
- ³ [Edlow v. RBW, LLC, 688 F.3d 26 \(1st Cir. 2012\) \(applying Massachusetts law\); DiMare v. MetLife Ins. Co., 369 Fed. Appx. 324 \(3d Cir. 2010\) \(applying New Jersey law\); Bouriez v. Carnegie Mellon University, 585 F.3d 765, 250 Ed. Law Rep. 532 \(3d Cir. 2009\) \(applying Pennsylvania law\); Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547 \(7th Cir. 2012\) \(applying Illinois law\); Cox v. Mortgage Electronic Registration Systems, Inc., 685 F.3d 663 \(8th Cir. 2012\) \(applying Minnesota law\); Lakeside Feeders, Inc. v. Producers Livestock Marketing Ass’n, 666 F.3d 1099 \(8th Cir. 2012\) \(applying Iowa law\); Dahlgren v. First Nat. Bank of Holdrege, 533 F.3d 681 \(8th Cir. 2008\) \(applying Nebraska law\); Alpine Bank v. Hubbell, 555 F.3d 1097 \(10th Cir. 2009\) \(applying Colorado law\); Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 919 N.Y.S.2d 465, 944 N.E.2d 1104 \(2011\); ISG State Operations, Inc. v. National Heritage Ins. Co., Inc., 234 S.W.3d 711 \(Tex. App. Eastland 2007\); State v. Apotex Corp., 2012 UT 36, 282 P.3d 66 \(Utah 2012\); Jennings v. Farmers Mut. Ins. Co., 224 W. Va. 636, 687 S.E.2d 574 \(2009\).](#)
- ⁴ [Lafarge North America, Inc. v. Discovery Group L.L.C., 574 F.3d 973 \(8th Cir. 2009\) \(applying Missouri law\); Swinson v. Lords Landing Village Condominium, 360 Md. 462, 758 A.2d 1008 \(2000\).](#)
- ⁵ [Bennett v. MIS Corp., 607 F.3d 1076 \(6th Cir. 2010\) \(applying Michigan law\).](#)
- ⁶ [Coleman v. Sears, Roebuck & Co., 319 F. Supp. 2d 544 \(W.D. Pa. 2003\) \(applying Pennsylvania law\).](#)
- ⁷ [Securities Investor Protection Corp. v. BDO Seidman, L.L.P., 95 N.Y.2d 702, 723 N.Y.S.2d 750, 746 N.E.2d 1042 \(2001\).](#)
- ⁸ [Sturm v. Harb Development, LLC, 298 Conn. 124, 2 A.3d 859 \(2010\); Spreitzer v. Hawkeye State Bank, 779 N.W.2d 726 \(Iowa 2009\).](#)
- ⁹ [Spreitzer v. Hawkeye State Bank, 779 N.W.2d 726 \(Iowa 2009\).](#)

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Fraud and Deceit

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II. Elements and Requisites

A. Basis of Action

2. Essential Elements of Action

§ 28. Misrepresentation—Intentional misrepresentation

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

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[Enforceability of Trial Period Plans \(TPP\) Under the Home Affordable Modification Program \(HAMP\)](#), 88 A.L.R. Fed. 2d 331

[Enforceability of Trial Period Plans \(TPP\) Under the Home Affordable Modification Program \(HAMP\)](#), 88 A.L.R. Fed. 2d 331

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Jacobs, [Help or HAMP\(Er\)?—The Courts' Reluctance to Provide the Right to a Private Action under HAMP and its Detrimental Effect on Homeowners](#), 47 Val. U. L. Rev. 267 (2012)

Maxwell, [The 75 Billion Dollar Question: Why is HAMP Not An Entitlement Program?](#), 97 Iowa L. Rev. 1305 (2012)

Parker, [Mending Broken Promises: Allowing Homeowners to Pursue Claims of Promissory Estoppel Against Lenders](#)

When Denied Loan Modifications, 47 New Eng. L. Rev. 985 (2013)
Sarapinian, *Fighting Foreclosure: Using Contract Law to Enforce the Home Affordable Modification Program*, 64 Hastings L.J. 905 (2013)

At common law, fraudulent misrepresentation and intentional misrepresentation are the same tort.¹ There is also authority holding that a cause of action for intentional misrepresentation is essentially a claim of fraud.² To state a claim for intentional misrepresentation, the plaintiff must show that the defendant made a misrepresentation of a material fact with knowledge of its falsity or recklessness as to whether it is true or false, that the defendant made the representation with intent to defraud and to induce the plaintiff to act upon it, the plaintiff believed the statement to be true and relied on it to his or her detriment, and the resulting injury was proximately caused by the reliance.³ The elements of a claim for intentional misrepresentation are an intentional falsity that is material, intended by the defendant to cause reliance, and that does cause detrimental reliance;⁴ the tort of intentional misrepresentation must be proved by showing that the representation was made with knowledge of its falsity or with conscious indifference to its truth and with the intention of causing another person to rely on the representation.⁵ Also, intentional misrepresentation requires proof of bad faith to the extent of knowingly making a false representation intended to induce reliance by another party.⁶

Observation:

Intentional and negligent misrepresentations are both actionable forms of fraud.⁷ Liability for intentional or negligent misrepresentations that threaten physical harm is grounded upon a duty that is coextensive with foreseeable risk, whereas in the separate and distinct sphere of misrepresentation involving risk of pecuniary loss, the representor's duty is much reduced.⁸ Claims for intentional and negligent misrepresentation require proof of a material, false representation, and detrimental reliance.⁹

CUMULATIVE SUPPLEMENT

Cases:

To prevail upon intentional misrepresentation claim under Maryland common law, plaintiff must establish by clear and convincing evidence that: (1) defendant made false representation to plaintiff; (2) falsity was either known to defendant or representation was made with reckless indifference as to its truth; (3) misrepresentation was made for purpose of defrauding plaintiff; (4) plaintiff relied on misrepresentation and had right to rely on it; and (5) plaintiff suffered compensable injury resulting from misrepresentation. *Mayor and City Council of Baltimore v. Unisys Corp.*, 59 F. Supp. 3d 729 (D. Md. 2014), reconsideration denied in part, 2014 WL 6950187 (D. Md. 2014).

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Footnotes

¹ *Kramer v. Petisi*, 285 Conn. 674, 940 A.2d 800 (2008).

- ² Reid v. Landsberger, 123 Conn. App. 260, 1 A.3d 1149 (2010), appeal denied, 298 Conn. 933, 10 A.3d 517 (2010) and appeal denied, 298 Conn. 933, 10 A.3d 517 (2010); Barrand, Inc. v. Whataburger, Inc., 214 S.W.3d 122 (Tex. App. Corpus Christi 2006).
- ³ Wooding v. U.S., 374 Fed. Appx. 309 (3d Cir. 2010) (applying Pennsylvania law); Kadlec Medical Center v. Lakeview Anesthesia Associates, 527 F.3d 412 (5th Cir. 2008) (applying Louisiana law); Felland v. Clifton, 682 F.3d 665 (7th Cir. 2012) (applying Wisconsin law); Boyd v. Tornier, Inc., 656 F.3d 487 (7th Cir. 2011) (applying both Missouri and Iowa law); Williamson v. Hi-Liter Graphics, LLC, 2012 WI App 37, 340 Wis. 2d 485, 811 N.W.2d 866 (Ct. App. 2012); Excel Const., Inc. v. HKM Engineering, Inc., 2010 WY 34, 228 P.3d 40 (Wyo. 2010).
- ⁴ CNH America LLC v. International Union, United Auto., Aerospace and Agr. Implement Workers of America (UAW), 645 F.3d 785 (6th Cir. 2011) (applying Wisconsin law).
- ⁵ Tessier v. Rockefeller, 162 N.H. 324, 33 A.3d 1118 (2011).
- ⁶ Excel Const., Inc. v. HKM Engineering, Inc., 2010 WY 34, 228 P.3d 40 (Wyo. 2010).
- ⁷ Conte v. Wyeth, Inc., 168 Cal. App. 4th 89, 85 Cal. Rptr. 3d 299 (1st Dist. 2008).
- ⁸ Brown v. Neff, 159 Misc. 2d 186, 603 N.Y.S.2d 707 (Sup 1993).
- ⁹ CNH America LLC v. International Union, United Auto., Aerospace and Agr. Implement Workers of America (UAW), 645 F.3d 785 (6th Cir. 2011).

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II. Elements and Requisites

A. Basis of Action

2. Essential Elements of Action

§ 29. Misrepresentation—Negligent misrepresentation

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  1 to 7, 26

The elements of a cause of action for negligent misrepresentation are that the defendant made a representation as to a past or existing material fact; the representation was untrue; the defendant, regardless of his or her actual belief, made the representation without any reasonable ground for believing it to be true; the representation was made with the intent to induce the plaintiff to rely on it; the plaintiff was unaware of the falsity of the representation, acted in reliance on the truth of it, and was justified in that reliance; and, as a result of this reliance, the plaintiff sustained damage.¹ The basis for damages resulting from negligent misrepresentation is the lack of care, and the basis for damages resulting from fraud is the want of honesty, thus giving rise to distinct causes of action, one in tort and the other in fraud.² As in a cause of action for fraud, a negligent misrepresentation claim requires proof of an actionable misrepresentation.³ The key difference between fraud and negligent misrepresentation is that fraud requires the conveyance of a known falsity while negligent misrepresentation is predicated upon the transmission of a negligently made false statement.⁴ In contrast to a negligent representation, a fraudulent representation is one that is knowingly untrue, or made without belief in its truth, or recklessly made and for the purpose of inducing action upon it.⁵

Observation:

The tort of innocent misrepresentation, in contrast to the tort of negligent misrepresentation, is predicated on principles of warranty.⁶ An innocent misrepresentation is as much a legal fraud as an intended misrepresentation, and the good faith of a party in making what proves to be a material misrepresentation is immaterial as to the question whether there was an actionable fraud if the other party acted on the misrepresentation to his or her detriment.⁷ The doctrine of innocent misrepresentation, in connection with obtaining a contract, recognizes that if there was in fact a misrepresentation, although made innocently, and its deceptive influence was effective, the consequences to the plaintiff being as serious as though it had proceeded from a vicious purpose, he or she would have a right of action for the damages caused thereby either at law or in equity.⁸

CUMULATIVE SUPPLEMENT

Cases:

Under California law, a negligent misrepresentation claim specifically requires a positive assertion; an alleged omission or a failure to disclose are insufficient. [Jackson v. Fischer](#), 931 F. Supp. 2d 1049 (N.D. Cal. 2013).

[END OF SUPPLEMENT]

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Footnotes

- ¹ [Continental Airlines, Inc. v. McDonnell Douglas Corp.](#), 216 Cal. App. 3d 388, 264 Cal. Rptr. 779 (2d Dist. 1989), reh'g denied and opinion modified, (Jan. 5, 1990).
- ² [Holland v. Peoples Bank & Trust Co.](#), 3 So. 3d 94 (Miss. 2008).
- ³ [Flegles, Inc. v. TruServ Corp.](#), 289 S.W.3d 544 (Ky. 2009).
- ⁴ [Armstrong v. Collins](#), 366 S.C. 204, 621 S.E.2d 368 (Ct. App. 2005).
- ⁵ [Kramer v. Petisi](#), 285 Conn. 674, 940 A.2d 800 (2008).
- ⁶ [Kramer v. Petisi](#), 285 Conn. 674, 940 A.2d 800 (2008).
- ⁷ [Billy Barnes Enterprises, Inc. v. Williams](#), 982 So. 2d 494 (Ala. 2007).
- ⁸ [Titan Ins. Co. v. Hyten](#), 491 Mich. 547, 817 N.W.2d 562 (2012).

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II. Elements and Requisites

A. Basis of Action

2. Essential Elements of Action

§ 30. Conspiracy to commit fraud

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

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A claim of conspiracy to commit fraud, standing alone, is not actionable; a lawful act done in a lawful way, no matter how damaging the result, cannot be the basis for a claim of fraudulent conspiracy even if it was performed maliciously.¹

Observation:

Some statutes mandate a certain scheme or conspiracy as an element of the fraud; accordingly, mail and wire fraud require an additional element, which is the existence of a scheme reasonably calculated to deceive persons of ordinary prudence and comprehension.²

Fraud and civil conspiracy are separate torts.³

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Footnotes

¹ [Callahan v. Gutowski](#), 111 A.D.2d 464, 488 N.Y.S.2d 519 (3d Dep't 1985).

² [Globe Internat., Inc. v. Superior Court](#), 9 Cal. App. 4th 393, 12 Cal. Rptr. 2d 109 (2d Dist. 1992), opinion modified,

(Sept. 9, 1992).

³ [Fisher v. Yates](#), 953 S.W.2d 370 (Tex. App. Texarkana 1997), review denied with per curiam opinion, 988 S.W.2d 730 (Tex. 1998).

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II. Elements and Requisites

B. Particular Elements or Considerations

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II. Elements and Requisites

B. Particular Elements or Considerations

1. In General

§ 31. Mental capacity and competence of parties

[Topic Summary](#) | [Correlation Table](#) | [References](#)

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The mental capacity, education, and business knowledge of each party are of importance in determining whether one party was, in fact, imposed upon by the representations or conduct of the other and whether he or she had a right to rely thereon.¹ What would constitute fraud in a given instance might not be fraudulent when exercised toward another person, the test being the actual effect of the false representation on the person's mind in a particular case, depending on whether that mind is strong and circumspect or weak and credulous.² Thus, exceptionally gullible or ignorant people may recover from a defendant who took advantage of them in circumstances where persons of normal intelligence would not have been misled.³ Therefore, although the element of disparity in business experience is not of itself a sufficient ground for relief, the law does not ignore such disparity, especially where the inexperience of youth is coupled with an added factor of special trust and confidence growing out of a reasonable assumption of the existence of a genuine and close friendship between the parties.⁴

Observation:

Where one of the parties to a transaction is shown to be mentally weak, the circumstances will be more closely scrutinized, and weight will be given to slighter evidence of imposition and circumvention.⁵

A misrepresentation of the nature of an instrument presented for the signature of one who cannot read is actionable fraud as a false representation of an existing material fact.⁶

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Footnotes

- ¹ [Smith v. Mosbarger](#), 18 Ariz. 19, 156 P. 79 (1916); [Van Natta v. Snyder](#), 98 Kan. 102, 157 P. 432 (1916).
- ² [Wilke v. Coinway, Inc.](#), 257 Cal. App. 2d 126, 64 Cal. Rptr. 845 (1st Dist. 1967).
- ³ [Black v. J. N. Blair & Co.](#), 145 Cal. App. 2d 524, 302 P.2d 609 (3d Dist. 1956).
- ⁴ [Spiess v. Brandt](#), 230 Minn. 246, 41 N.W.2d 561, 27 A.L.R.2d 1 (1950).
As to the effect of a special relationship or trust, see §§ 34 to 36.
- ⁵ [International Life Ins. Co. v. Herbert](#), 334 S.W.2d 525 (Tex. Civ. App. Waco 1960), writ refused n.r.e., (July 6, 1960).
- ⁶ [Fults v. Duren](#), 427 S.W.2d 951 (Tex. Civ. App. Houston 1st Dist. 1968), writ refused n.r.e., (Oct. 2, 1968).

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37 Am. Jur. 2d Fraud and Deceit § 32

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Fraud and Deceit

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II. Elements and Requisites

B. Particular Elements or Considerations

1. In General

§ 32. Necessity of false representation; definiteness

[Topic Summary](#) | [Correlation Table](#) | [References](#)

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An actual formal false representation is not essential to an action for deceit since the action may be based on a fraudulent concealment of a material fact¹ or on false pretenses and other fraudulent devices, schemes, or tricks.² In the broad sense of the term, however, a false representation of fact is an essential element of fraud either as the basis of an action for damages or as a ground for rescission,³ and it must be satisfactorily established.⁴ However, no particular rule can be laid down as to what false representation will constitute fraud since this necessarily depends on the facts of each case, the relative situation of the parties, and their means of information.⁵ To constitute the basis of fraud, the representations must be definite and not mere general statements uncertain in their character.⁶ Vague and indefinite statements or representations will not constitute the basis for fraud as a defense or as a ground for a cause of action,⁷ and neither will mere conclusory allegations that a person participated or assisted in the commission of a fraud establish the fraudulent representation requirement.⁸

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Footnotes

¹ §§ 194, 195.

² §§ 48 to 54.

³ [Landry v. First Nat. Bank in George West](#), 814 S.W.2d 86 (Tex. App. Corpus Christi 1991), writ denied, (Dec. 11, 1991); [Gardner v. Gardner](#), 190 Wis. 2d 216, 527 N.W.2d 701 (Ct. App. 1994).

⁴ §§ 460 to 463.

⁵ [National Cash Register Co. v. Townsend Grocery Store](#), 137 N.C. 652, 50 S.E. 306 (1905).
As to what constitutes actionable false representations, see §§ 59 to 62.

⁶ National School of Cosmeticians v. Magel, 11 Ohio L. Abs. 534, 1931 WL 2721 (Ct. App. 2d Dist. Miami County 1931); J.B. Colt Co. v. Wasson, 15 Ohio App. 484, 1922 WL 1972 (9th Dist. Wayne County 1922).

⁷ J.B. Colt Co. v. Wasson, 15 Ohio App. 484, 1922 WL 1972 (9th Dist. Wayne County 1922).

⁸ Glatzer v. Scappatura, 99 A.D.2d 505, 470 N.Y.S.2d 675 (2d Dep't 1984).

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37 Am. Jur. 2d Fraud and Deceit § 33

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II. Elements and Requisites

B. Particular Elements or Considerations

1. In General

§ 33. Necessity that defrauder benefit from or have interest in transaction; effect of benefit

[Topic Summary](#) | [Correlation Table](#) | [References](#)

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A.L.R. Library

[Misrepresentations as to financial condition or credit of third person as actionable by one extending credit in reliance thereon, 32 A.L.R.2d 184](#)

It is well settled that in order to render one liable for damages in an action for deceit, it is not necessary that he or she derive any benefit from the deception¹ or have colluded with the person who was so benefited.² A plaintiff need not prove that the defendant derived a benefit in order to maintain a fraud claim.³ Thus, where a third person fraudulently induces one to enter into a transaction, the third person may be liable for the fraud even though he or she receives no benefit therefrom.⁴ Conversely, it is not necessarily a proof of fraud that the defendant acted in self-interest or received a benefit from his or her actions.⁵

Observation:

Although not a necessary element of the cause of action for fraud, benefit to the defrauding party may constitute circumstantial evidence of an intent to defraud where intent is an element of the cause of action for fraud.⁶ Nevertheless, a motive for indirect gain does not infect an otherwise honest transaction with fraud.⁷

Moreover, it is not necessary, in order to establish remediable damage, that the person charged with fraud will have had any interest in the contemplated transaction or in the subject matter thereof.⁸ There is also authority holding that a party who knowingly receives and retains a benefit from a transaction that is tainted with fraud cannot later claim that benefit and disavow knowledge of the fraud; conversely, a party who receives no benefit from the transaction cannot be charged with knowledge of the fraud.⁹

Likewise, implicit in the constructive fraud requirement that a defendant take advantage of his or her position of trust to the plaintiff's detriment is the notion that the defendant must seek his or her own advantage in the transaction; that is, the defendant must seek to benefit himself or herself.¹⁰ Indeed, the primary difference between pleading a claim for constructive fraud and one for breach of fiduciary duty is the constructive fraud requirement that the defendant benefit himself or herself.¹¹ A fiduciary, who benefits in a transaction with the person for whom he or she is a fiduciary bears the burden of establishing that the transaction did not violate his or her obligations.¹²

With regard to an action in assumpsit or for money had and received, on the ground of fraud, it has been held essential to show that the defendant benefited from the fraud, in order to maintain the action.¹³

Observation:

A claim of innocent misrepresentation represents a species of fraudulent misrepresentation but has, as its distinguishing characteristics, the elimination of the need to prove a fraudulent purpose or an intent on the part of the defendant that the misrepresentation be acted upon by the plaintiff and has, as added elements, the necessity to show that an unintentional false representation was made in connection with the making of a contract and that the injury suffered as a consequence of the misrepresentation inured to the benefit of the party making the misrepresentation.¹⁴ A claim of innocent misrepresentation is shown where a party detrimentally relies on a false representation in such a manner that the injury inures to the benefit of the party making the misrepresentation.¹⁵

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Footnotes

- ¹ James-Dickinson Farm Mortgage Co. v. Harry, 273 U.S. 119, 47 S. Ct. 308, 71 L. Ed. 569 (1927); Hyma v. Lee, 338 Mich. 31, 60 N.W.2d 920 (1953).
- ² Sowers v. Robertson, 144 Kan. 273, 58 P.2d 1105 (1936); Kuelling v. Roderick Lean Mfg. Co., 183 N.Y. 78, 75 N.E. 1098 (1905).
- ³ Matis v. Golden, 228 S.W.3d 301 (Tex. App. Waco 2007).
- ⁴ § 295.
- ⁵ James v. Anderson, 149 Va. 113, 140 S.E. 264, 56 A.L.R. 421 (1927).
- ⁶ Cofacredit, S.A. v. Windsor Plumbing Supply Co., Inc., 187 F.3d 229 (2d Cir. 1999).
As to the elements of an action for fraud, see § 24.
- ⁷ New Blue Point Mining Co. v. Weissbein, 198 Cal. 261, 244 P. 325, 45 A.L.R. 781 (1926); Montgomery v. Phillips Petroleum Co., 49 S.W.2d 967 (Tex. Civ. App. Amarillo 1932), writ refused, (July 19, 1932).
- ⁸ Beatrice Creamery Co. v. Goldman, 1935 OK 1192, 175 Okla. 300, 52 P.2d 1033 (1935).

- ⁹ McRaith v. BDO Seidman, LLP, 391 Ill. App. 3d 565, 330 Ill. Dec. 597, 909 N.E.2d 310 (1st Dist. 2009).
- ¹⁰ Geo. Knight & Co., Inc. v. Watson Wyatt & Co., 170 F.3d 210 (1st Cir. 1999); Ridenhour v. International Business Machines Corp., 132 N.C. App. 563, 512 S.E.2d 774 (1999).
As to the elements of constructive fraud and fiduciary and confidential relationships, see §§ 9, 25, 34 to 36.
- ¹¹ Orr v. Calvert, 713 S.E.2d 39 (N.C. Ct. App. 2011), decision rev'd on other grounds, 365 N.C. 320, 720 S.E.2d 387 (2011).
- ¹² Cleary v. Cleary, 427 Mass. 286, 692 N.E.2d 955 (1998).
- ¹³ § 363.
- ¹⁴ M&D, Inc. v. W.B. McConkey, 231 Mich. App. 22, 585 N.W.2d 33 (1998).
As to innocent misrepresentation, generally, see § 121.
- ¹⁵ Roberts v. Saffell, 280 Mich. App. 397, 760 N.W.2d 715 (2008), judgment aff'd, 483 Mich. 1089, 766 N.W.2d 288 (2009).

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II. Elements and Requisites

B. Particular Elements or Considerations

2. Relationship of Parties

§ 34. Generally; confidential or fiduciary relationship; fiduciary duty

[Topic Summary](#) | [Correlation Table](#) | [References](#)

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Although no privity of contract is required between a defrauded person and the defendant in order to maintain an action for fraud and deceit,¹ there can be no fraud in law or in fact without a breach of some legal or equitable duty.² Indeed, the presence of a legal duty is an essential element of a claim for constructive fraud.³ Although the duty not to make misrepresentations does not depend on the existence of a fiduciary relationship,⁴ nevertheless, fraud is often presumed or inferred where a confidential or fiduciary relationship exists between the parties to a transaction or contract.⁵

Constructive fraud often exists where the parties to a transaction have a special confidential or fiduciary relation which affords the power and means to one to take undue advantage of, or exercise undue influence over, the other.⁶ In fact, a fiduciary or other special relationship must exist in order to support a constructive fraud action.⁷ Moreover, where actual fraud has not been shown, a defendant may still be guilty of constructive fraud in situations where a special confidential relationship between the parties created a fiduciary duty in the defendant to act with the plaintiff's interests in mind.⁸

The creation of a fiduciary duty does not depend upon the existence of an agreement or contract between the parties but results from the relationship between the fiduciary and the beneficiary.⁹ Generally, whether a fiduciary duty exists, and the extent of that duty, depends upon the facts and circumstances of the case and the relationship of the parties;¹⁰ as a basic proposition, for a fiduciary duty to exist, there must be a fiduciary relationship between the parties.¹¹

Observation:

A fiduciary duty will not be lightly created, as it imposes extraordinary duties and requires the fiduciary to put the interests of the beneficiary ahead of its own if the need arises.¹² Before a person can be charged with a fiduciary obligation, he or she must either knowingly undertake to act on behalf and for the benefit of another or must enter into a relationship which imposes that undertaking as a matter of law.¹³ Also, in order to give full force to contracts, a court does not impose an informal fiduciary duty

lightly.¹⁴

A fiduciary duty is one in which there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence, and it extends to any possible case in which a fiduciary relationship exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other.¹⁵ A fiduciary is generally defined as a person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence, and candor.¹⁶ A fiduciary is a person who is required to act for the benefit of another person on all matters within the scope of their relationship;¹⁷ one who owes to another the duties of good faith, trust, confidence, and candor or one who must exercise a high standard of care in managing another's money or property.¹⁸

CUMULATIVE SUPPLEMENT

Cases:

Allegations of buyer of rare watch, that corporate seller and its president represented themselves to buyer as watch dealers with significant rare watch expertise, were insufficient allegations of a fiduciary relationship under Arizona law, as would be required to state a claim for breach of fiduciary duty, relating to delivery of watch that did not have its original dial. [Cavan v. Maron](#), 182 F. Supp. 3d 954 (D. Ariz. 2016).

For purposes of a breach of fiduciary duty claim, a fiduciary relationship exists under New York law when one is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation. [Schwartzco Enterprises LLC v. TMH Management, LLC](#), 60 F. Supp. 3d 331 (E.D. N.Y. 2014).

Under New York law, the elements of a breach of fiduciary duty are: (1) the existence of a fiduciary duty; (2) a knowing breach of that duty; and (3) damages resulting therefrom. [Ray Legal Consulting Group v. DiJoseph](#), 37 F. Supp. 3d 704 (S.D. N.Y. 2014).

Allegations in Chapter 7 debtor's complaint did not plead any facts supporting existence of fiduciary relationship between herself and deed of trust creditor, and did not state plausible claim, under California law, for constructive fraud in connection with deed of trust foreclosure sale. [In re Greenstein](#), 576 B.R. 139 (Bankr. C.D. Cal. 2017).

A breach of fiduciary duty is not required to establish constructive fraud. [Doe v. Boy Scouts of America](#), 356 P.3d 1049 (Idaho 2015).

To succeed on a claim for breach of fiduciary duty, a party must show: (1) the existence of a duty arising from a fiduciary relationship; (2) a failure to observe the duty; and (3) an injury resulting proximately therefrom. [D & H Autobath v. PJCS Properties I, Inc.](#), 2012-Ohio-5845, 983 N.E.2d 891 (Ohio Ct. App. 12th Dist. Fayette County 2012).

[END OF SUPPLEMENT]

Footnotes

¹ § 295.

Northwest Realty Co. v. Colling, 82 S.D. 421, 147 N.W.2d 675 (1966).

H-D Irrigating, Inc. v. Kimble Properties, Inc., 2000 MT 212, 301 Mont. 34, 8 P.3d 95 (2000).

Fry v. UAL Corp., 84 F.3d 936 (7th Cir. 1996).

§ 462.

§ 9.

Assilzadeh v. California Federal Bank, 82 Cal. App. 4th 399, 98 Cal. Rptr. 2d 176 (2d Dist. 2000); Cash in a Flash, Inc. v. McCullough, 853 N.E.2d 533 (Ind. Ct. App. 2006); Refreshment Management Services, Corp. v. Complete Office Supply Warehouse Corp., 89 A.D.3d 913, 933 N.Y.S.2d 312 (2d Dep't 2011); Eastover Ridge, L.L.C. v. Metric Constructors, Inc., 139 N.C. App. 360, 533 S.E.2d 827 (2000).

As to constructive and actual fraud, generally, see §§ 8, 9.

Garrison v. CC Builders, Inc., 2008 WY 34, 179 P.3d 867 (Wyo. 2008).

Benfeld v. Fleming Properties, LLC, 89 A.D.3d 654, 932 N.Y.S.2d 140 (2d Dep't 2011).

Terrebonne Concrete, LLC v. CEC Enterprises, LLC, 76 So. 3d 502 (La. Ct. App. 1st Cir. 2011), writ denied, 75 So. 3d 464 (La. 2011).

Omega Center for Pain Management, L.L.C. v. Omega Institute of Health, Inc., 975 So. 2d 48 (La. Ct. App. 5th Cir. 2007).

In re Jackson Nat. Life Ins. Co. Premium Litigation, 193 F.R.D. 505 (W.D. Mich. 2000) (applying Texas law).

City of Hope Nat. Medical Center v. Genentech, Inc., 43 Cal. 4th 375, 75 Cal. Rptr. 3d 333, 181 P.3d 142 (2008).

Areda v. S-W Transp., Inc., 365 S.W.3d 838 (Tex. App. Dallas 2012).

Ehrenhaus v. Baker, 717 S.E.2d 9 (N.C. Ct. App. 2011).

U.S. v. Milovanovic, 678 F.3d 713 (9th Cir. 2012), as amended, (May 22, 2012).

Federal Ins. Co. v. International Business Machines Corp., 18 N.Y.3d 642, 942 N.Y.S.2d 432, 965 N.E.2d 934 (2012); Dykstra v. Page Holding Co., 2009 SD 38, 766 N.W.2d 491 (S.D. 2009).

Federal Ins. Co. v. International Business Machines Corp., 18 N.Y.3d 642, 942 N.Y.S.2d 432, 965 N.E.2d 934 (2012).

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II. Elements and Requisites

B. Particular Elements or Considerations

2. Relationship of Parties

§ 35. Scope of duty where confidential or fiduciary relationship exists

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Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 62](#) (Complaint, petition, or declaration—Allegation—Confidential relationship—Reliance on representation)

Where a confidential or fiduciary relationship exists, it is the duty of the person in whom the confidence is reposed to exercise the utmost good faith in the transaction with due regard to the interests of the one reposing confidence,¹ to make full and truthful disclosures of all material facts,² and to refrain from abusing such confidence by obtaining any advantage to himself or herself at the expense of the confiding party.³ A fiduciary duty is a duty of loyalty;⁴ it is a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence.⁵ A fiduciary duty arises out of a confidential relationship which exists when one party gains the confidence of the other and purports to act or advise with the other's interest in mind⁶ or from an informal relationship where one person trusts in and relies upon another, whether the relation is a moral, social, domestic, or purely personal one.⁷ A fiduciary duty extends to every possible case in which there is confidence reposed on one side and the resulting superiority and influence on the other; the rule embraces both technical fiduciary relations and those informal relations which exist whenever one person trusts in and relies upon another.⁸ The existence of a fiduciary relationship necessarily assumes that one of the parties has a duty to act for, or to give advice for, the benefit of the other upon matters within the scope of the fiduciary relationship.⁹ Fiduciary obligations generally come into play between two parties to a contract when one party's vulnerability is so substantial as to give rise to equitable concerns underlying the protection afforded by the law governing fiduciaries.¹⁰ Should an advantage be obtained by a fiduciary, he or she will not be permitted to retain the benefit, and the transaction will be set aside even though it could not have been impeached had no such relation existed,¹¹ whether the unconscionable advantage was obtained by misrepresentations or artifice,¹² concealment or suppression of material facts,¹³ or undue

influence.¹⁴ Even if a fiduciary does not obtain a benefit from a third party by violating his or her duty, such fiduciary may be required to forfeit the right to compensation for his or her work.¹⁵

CUMULATIVE SUPPLEMENT

Cases:

Term “defalcation,” as commonly used, can encompass a breach of fiduciary obligation that involves neither conversion, nor taking and carrying away another’s property, nor falsity. [Bullock v. BankChampaign, N.A., 133 S. Ct. 1754 \(2013\)](#).

Under Florida law, fiduciaries are forbidden to make any profit or acquire any other personal benefit or advantage that is not also enjoyed by fiduciary beneficiary, and if they do, they may be compelled to account to beneficiary in appropriate action. [Southland Health Services, Inc. v. Bank of Vernon, 887 F. Supp. 2d 1158 \(N.D. Ala. 2012\)](#).

For purposes of a fraud claim under New York law premised on an omission, a fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation. [First Hill Partners, LLC v. BlueCrest Capital Management Ltd., 52 F. Supp. 3d 625 \(S.D. N.Y. 2014\)](#).

The circumstances which may create a fiduciary relationship are so varied and so difficult to foresee that it is unwise for courts to attempt to make comprehensive definitions; as such, fiduciary duties may arise wherever faith, confidence, and trust is reposed by one party in another’s judgment and advice. [UBS Financial Services, Inc. v. Aliberti, 483 Mass. 396, 133 N.E.3d 277 \(2019\)](#).

[END OF SUPPLEMENT]

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Footnotes

- ¹ [Steinert v. Winn Group, Inc., 83 F. Supp. 2d 1234 \(D. Kan. 2000\) \(applying Kansas law\); Williams-Garrett v. Murphy, 106 F. Supp. 2d 834 \(D.S.C. 2000\) \(applying South Carolina law\); Safeway Transp., Inc. v. West Chambers Transp., Inc., 100 F. Supp. 2d 442 \(S.D. Tex. 2000\) \(applying Texas law\); Dalton v. Camp, 138 N.C. App. 201, 531 S.E.2d 258 \(2000\), decision rev’d on other grounds, 353 N.C. 647, 548 S.E.2d 704 \(2001\); In re Estate of Stevenson, 2000 SD 24, 605 N.W.2d 818 \(S.D. 2000\)](#).
- ² [§ 201](#).
- ³ [In re Estate of Stevenson, 2000 SD 24, 605 N.W.2d 818 \(S.D. 2000\); Stephenson v. LeBoeuf, 16 S.W.3d 829 \(Tex. App. Houston 14th Dist. 2000\)](#).
- ⁴ [Great Rivers Co-op. of Southeastern Iowa v. Farmland Industries, Inc., 198 F.3d 685, 45 Fed. R. Serv. 3d 833 \(8th Cir. 1999\) \(applying Kansas law\); Moody v. Stribling, 127 N.M. 630, 1999-NMCA-094, 985 P.2d 1210 \(Ct. App. 1999\)](#).
- ⁵ [Snow Pallet, Inc. v. Monticello Banking Co., 367 S.W.3d 1 \(Ky. Ct. App. 2012\)](#).
- ⁶ [Gonzalez v. Union Pacific R.R. Co., 282 Neb. 47, 803 N.W.2d 424 \(2011\)](#).
- ⁷ [Young v. Fawcett, 376 S.W.3d 209 \(Tex. App. Beaumont 2012\)](#).
- ⁸ [Masztal v. City of Miami, 971 So. 2d 803 \(Fla. 3d DCA 2007\)](#).
- ⁹ [BBS Power Mod, Inc. v. Prestolite Elec., Inc., 71 F. Supp. 2d 194 \(W.D. N.Y. 1999\) \(applying New York law\)](#).

§ 35. Scope of duty where confidential or fiduciary..., 37 Am. Jur. 2d Fraud...

Shivvers v. Hertz Farm Management, Inc., 595 N.W.2d 476 (Iowa 1999); Teadt v. Lutheran Church Missouri Synod, 237 Mich. App. 567, 603 N.W.2d 816 (1999); McConnell v. Hunt Sports Ent., 132 Ohio App. 3d 657, 725 N.E.2d 1193 (10th Dist. Franklin County 1999); Daktronics, Inc. v. McAfee, 1999 SD 113, 599 N.W.2d 358 (S.D. 1999).

¹⁰ City of Hope Nat. Medical Center v. Genentech, Inc., 43 Cal. 4th 375, 75 Cal. Rptr. 3d 333, 181 P.3d 142 (2008).

¹¹ Vail v. Vail, 233 N.C. 109, 63 S.E.2d 202 (1951).

¹² Vail v. Vail, 233 N.C. 109, 63 S.E.2d 202 (1951).

¹³ § 201.

¹⁴ Gray v. Gray, 246 Ala. 627, 22 So. 2d 21 (1945).

As to the distinction between causes of action for fraud and undue influence, see §§ 15, 16.

¹⁵ ERI Consulting Engineers, Inc. v. Swinnea, 318 S.W.3d 867 (Tex. 2010).

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37 Am. Jur. 2d Fraud and Deceit § 36

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II. Elements and Requisites

B. Particular Elements or Considerations

2. Relationship of Parties

§ 36. Scope of duty where confidential or fiduciary relationship exists—Breach of duty as tort

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

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The courts generally do not recognize a breach of fiduciary duty as a stand-alone tort;¹ however, when monetary damages are sought, a claim or cause of action for breach of a fiduciary duty may be available but only if the breach gives rise to another cause of action.² It has also been held that a breach of fiduciary duty cause of action is a tort to remedy economic harm suffered by one party due to a breach of duties owed in a fiduciary relationship.³ Breach of fiduciary duty is a tort that arises from the violation of a relationship of trust and confidence.⁴

Where a breach of fiduciary duty is asserted as a tort claim, the plaintiff must prove that a fiduciary duty or relationship existed between the plaintiff and the defendant, that the defendant breached it, and that the breach proximately caused the plaintiff to suffer harm or damages.⁵ To establish a claim for breach of fiduciary duty, a plaintiff must prove: (1) that it was justified in reposing trust or confidence in the other party, or that the other party invited, accepted, or acquiesced in that trust; (2) that the other party assumed a primary duty to represent the plaintiff's interest in a transaction; (3) that the nature and scope of the duty extended to the subject matter of the claim; and (4) that it was damaged by the trustee's breach of that duty.⁶ Thus, a plaintiff must allege the actual placing of trust and confidence in the defendant and must show that there is some disparity in the bargaining positions of the parties and that the dominant party has abused its position of trust.⁷

Observation:

A confidential relationship giving rise to an informal fiduciary duty must exist prior to and apart from the agreement that is the basis of a suit which includes a breach of fiduciary duty claim.⁸ Before a fiduciary duty is imposed in a business context, the special relationship of trust and confidence must exist prior to, and apart from, the agreement made the basis of a breach of fiduciary duty suit.⁹

A fiduciary's duty of loyalty involves a state of mind, so that a claimed breach of that duty goes beyond simple negligence.¹⁰ However, fraud is not an element of an actionable breach of fiduciary duty claim.¹¹ Breach of fiduciary duty is not actionable unless injury accrues to the beneficiary or the fiduciary profits thereby.¹²

CUMULATIVE SUPPLEMENT

Cases:

Under Maryland law, to state a claim for negligence based on fiduciary duty, a plaintiff must allege that (1) a fiduciary relationship existed, (2) the fiduciary breached the duty it owed to the beneficiary, and (3) the breach caused harm to the beneficiary. [Sterling v. Ourisman Chevrolet of Bowie Inc.](#), 943 F. Supp. 2d 577 (D. Md. 2013).

To prevail on a breach of fiduciary duty claim under Nevada law, the plaintiff must establish: (1) the existence of a fiduciary duty; (2) breach of that duty; and (3) the breach proximately caused the damages. [Takiguchi v. MRI Intern., Inc.](#), 47 F. Supp. 3d 1100 (D. Nev. 2014).

Under New York law, the elements of a claim for breach of fiduciary duty are: (1) the existence of a fiduciary duty; (2) a knowing breach of that duty; and (3) damages resulting therefrom. [Barnett v. Countrywide Bank, FSB](#), 60 F. Supp. 3d 379 (E.D. N.Y. 2014).

Under New York law, the elements of a claim for breach of fiduciary duty are: (1) the existence of a fiduciary duty; (2) a knowing breach of that duty; and (3) damages resulting therefrom. [Schwartzco Enterprises LLC v. TMH Management, LLC](#), 60 F. Supp. 3d 331 (E.D. N.Y. 2014).

Under New York law, the elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct. [Miller v. Wells Fargo Bank, N.A.](#), 994 F. Supp. 2d 542 (S.D. N.Y. 2014).

In order to state claim for breach of fiduciary duty under Texas law, plaintiff must allege the existence of fiduciary duty, breach of that duty, causation, and damages. [In re Conex Holdings, LLC](#), 514 B.R. 405 (Bankr. D. Del. 2014).

There is no cause of action in Illinois for negligent or grossly negligent breach of fiduciary duty. [Palm v. 2800 Lake Shore Drive Condominium Ass'n](#), 2014 IL App (1st) 111290, 381 Ill. Dec. 222, 10 N.E.3d 307 (App. Ct. 1st Dist. 2014).

[END OF SUPPLEMENT]

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Footnotes

¹ [Latty v. St. Joseph's Soc. of Sacred Heart, Inc.](#), 198 Md. App. 254, 17 A.3d 155 (2011).

² [Latty v. St. Joseph's Soc. of Sacred Heart, Inc.](#), 198 Md. App. 254, 17 A.3d 155 (2011).

³ [Accident & Injury Medical Specialists, P.C. v. Mintz](#), 2012 CO 50, 279 P.3d 658 (Colo. 2012).

⁴ [State Resources Corp. v. Lawyers Title Ins. Corp.](#), 224 S.W.3d 39 (Mo. Ct. App. S.D. 2007); [Doe v. Roman Catholic Diocese of Rochester](#), 51 A.D.3d 1392, 857 N.Y.S.2d 866 (4th Dep't 2008), rev'd on other grounds, 12 N.Y.3d 764, 879 N.Y.S.2d 805, 907 N.E.2d 683 (2009).

- ⁵ Ruttenberg v. Friedman, 97 So. 3d 114 (Ala. 2012); Amtower v. Photon Dynamics, Inc., 158 Cal. App. 4th 1582, 71 Cal. Rptr. 3d 361 (6th Dist. 2008), as modified, (Feb. 15, 2008); Crusselle v. Mong, 59 So. 3d 1178 (Fla. 5th DCA 2011); Moses v. Pennebaker, 312 Ga. App. 623, 719 S.E.2d 521 (2011); Tully v. McLean, 409 Ill. App. 3d 659, 350 Ill. Dec. 434, 948 N.E.2d 714 (1st Dist. 2011); Western Blue Print Co., LLC v. Roberts, 367 S.W.3d 7 (Mo. 2012); McFadden Ranch, Inc. v. McFadden, 19 Neb. App. 366, 807 N.W.2d 785 (2011); Parekh v. Cain, 96 A.D.3d 812, 948 N.Y.S.2d 72 (2d Dep't 2012); Camp Mystic, Inc. v. Eastland, 2012 WL 2334604 (Tex. App. San Antonio 2012), rule 53.7(f) motion granted, (Oct. 22, 2012); Berner Cheese Corp. v. Krug, 2008 WI 95, 312 Wis. 2d 251, 752 N.W.2d 800 (2008).
- ⁶ Grynberg v. Total S.A., 538 F.3d 1336 (10th Cir. 2008) (applying Colorado law).
- ⁷ Anderson v. Hannaford Bros. Co., 659 F.3d 151 (1st Cir. 2011) (applying Maine law).
- ⁸ LeBlanc v. Lange, 365 S.W.3d 70 (Tex. App. Houston 1st Dist. 2011).
- ⁹ Daniels v. Empty Eye, Inc., 368 S.W.3d 743 (Tex. App. Houston 14th Dist. 2012), reh'g overruled, (June 6, 2012) and petition for review filed, (July 23, 2012).
- ¹⁰ Yates v. Holt-Smith, 2009 WI App 79, 319 Wis. 2d 756, 768 N.W.2d 213 (Ct. App. 2009).
- ¹¹ Joyner v. Liprie, 33 So. 3d 242 (La. Ct. App. 2d Cir. 2010), writ denied, 45 So. 3d 1043 (La. 2010); Moody v. Stribling, 127 N.M. 630, 1999-NMCA-094, 985 P.2d 1210 (Ct. App. 1999).
- ¹² Randolph v. ING Life Ins. and Annuity Co., 973 A.2d 702 (D.C. 2009).

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37 Am. Jur. 2d Fraud and Deceit § 37

American Jurisprudence, Second Edition | May 2021 Update

Fraud and Deceit

George Blum, J.D., John Bourdeau, J.D., Romualdo P. Eclavea, J.D., Janice Holben, J.D., Karl Oakes, J.D. and Eric C. Surette, J.D.

II. Elements and Requisites

B. Particular Elements or Considerations

2. Relationship of Parties

§ 37. What constitutes fiduciary or confidential relationship

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  1 to 7, 26

The term “fiduciary or confidential relation” is a very broad one,¹ and the courts have carefully refrained from defining the particular instances of fiduciary relations in such a manner as to exclude other and perhaps new cases.² Whether a confidential relationship exists, for purposes of determining whether a fiduciary relationship exists, is determined from the actualities of the relationship between the persons involved.³

A fiduciary relationship is an extraordinary one and will not be lightly created.⁴ In some jurisdictions, express fiduciary relationships are created by contract or legal proceedings.⁵ When a fiduciary or confidential relationship is not created by law or contract, determining whether a fiduciary relationship exists requires looking at the particular facts and circumstances of a given case.⁶ Where there is not an express fiduciary relationship, one may be implied in law based on the specific factual situation surrounding the transaction and the relationship of the parties.⁷

Observation:

There are two types of fiduciary relationships: formal fiduciary relationships that arise as a matter of law, such as attorney-client, partnership, trustee, and principal-agent relationships; and informal fiduciary relationships or confidential relationships that may arise from moral, social, domestic, or personal relationships.⁸ The two types of fiduciary relationships have also been stated to be (1) those that arise from legal relations such as attorney and client, broker and client, partners, principal and agent, trustee and cestui que trust; and (2) those that exist as a fact, in which there is confidence reposed on one side, and the resulting superiority and influence on the other.⁹ Because not every relationship involving a high degree of trust and confidence rises to the stature of a formal fiduciary relationship,¹⁰ the law recognizes the existence of an informal or confidential fiduciary relationship.¹¹

In determining whether a confidential or fiduciary relationship exists between the parties, the relevant factors have been held to include—

- the degree of kinship between the parties; the disparity in age, health, education, or business experience between the parties; and the extent to which the servient party entrusted the handling of its business to the dominant party and placed its trust and confidence in it.¹²
- whether the plaintiff relied on the defendant for support, the plaintiff's advanced age and poor health, and evidence of the plaintiff's trust.¹³
- whether one person has to be taken care of by others; whether one person maintains a close relationship with another; whether one person is provided transportation and has medical care provided for by another; whether one person maintains joint accounts with another; whether one is physically or mentally weak; whether one is of advanced age or poor health; and whether there exists a power of attorney between the one and another.¹⁴
- in addition to confidence of the one in the other, the existence of a certain inequality, dependence, weakness of age, of mental strength, business intelligence, knowledge of the facts involved, or other conditions giving to one advantage over the other.¹⁵
- advanced age, youth, lack of education, ill health, and mental weakness.¹⁶

A fiduciary relationship is one founded on trust or confidence reposed by one person in the integrity and fidelity of another and which also necessarily involves an undertaking in which a duty is created in one person to act primarily for another's benefit in matters connected with such undertaking.¹⁷ A confidential relationship exists between two persons if one has gained the confidence of the other and purports to act or advise with the other's interest in mind.¹⁸ The party in whom the trust and confidence are reposed, in a confidential relationship, must act with scrupulous fairness and good faith in his or her dealings with the other and refrain from using his or her position to the other's detriment and his or her own advantage.¹⁹ A fiduciary or confidential relationship exists where confidence is reposed by one party and trust is accepted by the other, or where confidence has been acquired and abused,²⁰ or where influence has been acquired and abused, and in which confidence has been reposed and betrayed.²¹

On the other hand, solely because the relationship between the parties has been lengthy and cordial does not necessarily mean a confidential relationship exists, as a basis for informal fiduciary relationship.²² The fact that the parties are friends or prior business associates, or have trust and confidence in each other's integrity, does not automatically establish a confidential relationship, as required for a fiduciary relationship to arise under the law;²³ and even a longstanding relationship of friendship or cordiality is insufficient, without more, to establish an informal fiduciary relationship.²⁴ The mere fact that one party subjectively trusts another party does not alone indicate that confidence is placed in another in the sense demanded by fiduciary relationships because something apart from the transaction between the parties is required.²⁵ Because subjective trust is insufficient to create a fiduciary relationship, the mere fact that one party trusts another does not transform a business arrangement into a fiduciary relationship; the trust must be justifiable.²⁶

CUMULATIVE SUPPLEMENT

Cases:

Under Massachusetts law, a fiduciary relationship exists only if the plaintiff justifiably reposed trust in the defendant and the defendant knew of and accepted that trust. [Baker v. Goldman, Sachs & Co.](#), 771 F.3d 37 (1st Cir. 2014).

Under Illinois law, the dominant party must accept the responsibility, and accept the trust of the other party, before a court can find a fiduciary relationship. [Avila v. CitiMortgage, Inc.](#), 801 F.3d 777 (7th Cir. 2015).

Under Colorado law, a fiduciary is a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with the undertaking. [Lindeman v. The Corporation of the President of the Church of Jesus Christ of Latter-Day Saints](#), 43 F. Supp. 3d 1197 (D. Colo. 2014).

Before a fiduciary duty can be breached, there must exist a fiduciary relationship; “fiduciary relation” exists between two parties when one is under a duty to act or to give advice for the benefit of the other upon a matter within the scope of the

relation. [Zazzali v. Ellison](#), 973 F. Supp. 2d 1187 (D. Idaho 2013).

Under Kentucky law, to prove that a fiduciary relationship existed, the aggrieved party must establish three elements: (1) the relationship existed before the transaction that is the subject of the action; (2) the aggrieved party's reliance was not merely subjective; and (3) the nature of the relationship imposed a duty upon the fiduciary to act in the principal's interest, even if such action were to the detriment of the fiduciary. [Guangzhou Consortium Display Product Co., Ltd. v. PNC Bank, Nat. Ass'n](#), 956 F. Supp. 2d 769 (E.D. Ky. 2013).

Under Louisiana law, the defining characteristic of a fiduciary relationship is the special relationship of confidence or trust imposed by one in another who undertakes to act primarily for the benefit of the principal in a particular endeavor. [Zaveri v. Condor Petroleum Corp.](#), 27 F. Supp. 3d 695 (W.D. La. 2014).

Under Pennsylvania law, a "fiduciary relationship" arises where one person has reposed a special confidence in another to the extent that the parties do not deal with each other on equal terms, either because of an overmastering dominance on one side or weakness, dependence, or justifiable trust, on the other; such relationships include the relationship between attorneys and their clients, between majority and minority shareholders, and between joint venturers, but do not include relationships that arise solely out of an arms length business contract. [Alsa Corp. v. PPG Industries, Inc.](#), 2014 WL 1921152 (D. Mass. 2014).

Under Minnesota law, truck drivers who entered into lease agreements with a federally regulated motor carrier to haul freight failed to state a claim for breach of fiduciary duty in connection with the carrier's alleged failure to pay agreed compensation; the only allegation made with respect to the existence of a fiduciary relationship was that "Defendants owed Plaintiffs a fiduciary duty to accurately report charges billed by [the carrier] to its customers, accurately report each Plaintiff's compensation on settlement statements, and ensure that each Plaintiffs' portion of revenue billed by [the carrier] was paid to each Plaintiff." [Ransom v. VFS, Inc.](#), 918 F. Supp. 2d 888 (D. Minn. 2013).

There are four elements essential to the establishment of a fiduciary relationship under New York law: (1) the vulnerability of one party to the other which (2) results in the empowerment of the stronger party by the weaker which (3) empowerment has been solicited or accepted by the stronger party and (4) prevents the weaker party from effectively protecting itself. [Lia v. Saporito](#), 909 F. Supp. 2d 149 (E.D. N.Y. 2012).

In determining whether a fiduciary relationship exists under New York law, courts look first to whether there is a contractual relationship between the parties and, where parties have entered into a contract, courts look to that agreement to discover the nexus of the parties' relationship and the particular contractual expression establishing the parties' interdependency. [Tucker v. Wyckoff Heights Medical Center](#), 52 F. Supp. 3d 583 (S.D. N.Y. 2014).

A fiduciary duty exists under Oregon law only where the parties are in a "special relationship," in which one party is obliged to pursue the other party's best interests. [Giuliano v. Anchorage Advisors, LLC](#), 2014 WL 1917949 (D. Or. 2014).

Under Oklahoma law, fiduciary relationship springs from an attitude of trust and confidence and is based on some form of agreement, either expressed or implied, from which it can be said that minds have been met to create mutual obligation. [In re Vetter Assets Service, LLC](#), 609 B.R. 279 (Bankr. W.D. Okla. 2019).

Agreement between ex-wife and ex-husband not to sell former marital home and to maintain it while children finished high school, which agreement was made despite fact that divorce decree specified they were to sell home and split net proceeds, did not give rise to informal fiduciary duty between husband and wife, where ex-wife and ex-husband did not have a relationship of trust and confidence following divorce. [Robbins v. Robbins](#), 550 S.W.3d 846 (Tex. App. Fort Worth 2018).

[END OF SUPPLEMENT]

- 1 Quinn v. Phipps, 93 Fla. 805, 113 So. 419, 54 A.L.R. 1173 (1927).
- 2 Robertson v. Robertson, 15 S.W.3d 407 (Mo. Ct. App. S.D. 2000).
- 3 Young v. Fawcett, 376 S.W.3d 209 (Tex. App. Beaumont 2012).
- 4 In re Estate of Abernethy, 2012 WL 1943760 (Tex. App. El Paso 2012).
- 5 Hogan v. Provident Life and Acc. Ins. Co., 665 F. Supp. 2d 1273 (M.D. Fla. 2009) (applying Florida law).
- 6 Savu v. SunTrust Bank, 293 Ga. App. 683, 668 S.E.2d 276 (2008); Benson v. Stafford, 407 Ill. App. 3d 902, 346 Ill. Dec. 828, 941 N.E.2d 386 (1st Dist. 2010); Linden Place, LLC v. Stanley Bank, 38 Kan. App. 2d 504, 167 P.3d 374 (2007); Crumley & Associates, P.C. v. Charles Peed & Associates, P.A., 730 S.E.2d 763 (N.C. Ct. App. 2012); American Bank Center v. Wiest, 2010 ND 251, 793 N.W.2d 172 (N.D. 2010).
- 7 Real Estate Value Co., Inc. v. Carnival Corp., 92 So. 3d 255 (Fla. 3d DCA 2012).
- 8 In re Estate of Abernethy, 2012 WL 1943760 (Tex. App. El Paso 2012).
- 9 Ellison v. Alexander, 207 N.C. App. 401, 700 S.E.2d 102 (2010); S.N.R. Management Corp. v. Danube Partners 141, LLC, 189 N.C. App. 601, 659 S.E.2d 442 (2008).
- 10 Young v. Fawcett, 376 S.W.3d 209 (Tex. App. Beaumont 2012).
- 11 SJW Property Commerce, Inc. v. Southwest Pinnacle Properties, Inc., 328 S.W.3d 121 (Tex. App. Corpus Christi 2010), review denied, (Mar. 9, 2012).
- 12 Benson v. Stafford, 407 Ill. App. 3d 902, 346 Ill. Dec. 828, 941 N.E.2d 386 (1st Dist. 2010).
- 13 Young v. Fawcett, 376 S.W.3d 209 (Tex. App. Beaumont 2012).
- 14 Yarbrough v. Patrick, 65 So. 3d 865 (Miss. Ct. App. 2011).
- 15 Kent v. United of Omaha Life Ins. Co., 484 F.3d 988 (8th Cir. 2007) (applying South Dakota law); Cole v. Wellmark of South Dakota, Inc., 2009 SD 108, 776 N.W.2d 240 (S.D. 2009).
- 16 Brown v. Wells Fargo Bank, NA, 168 Cal. App. 4th 938, 85 Cal. Rptr. 3d 817 (2d Dist. 2008).
- 17 de Jong v. Leitchfield Deposit Bank, 254 S.W.3d 817 (Ky. Ct. App. 2007).
- 18 In re Estate of Hedke, 278 Neb. 727, 775 N.W.2d 13 (2009).
- 19 Weiley v. Albert Einstein Medical Center, 2012 PA Super 106, 2012 WL 1889634 (2012).
- 20 American Honda Motor Co., Inc. v. Motorcycle Information Network, Inc., 390 F. Supp. 2d 1170 (M.D. Fla. 2005) (applying Florida law).
- 21 Braddock v. Braddock, 60 A.D.3d 84, 871 N.Y.S.2d 68 (1st Dep't 2009); Young v. Fawcett, 376 S.W.3d 209 (Tex. App. Beaumont 2012).
- 22 In re Estate of Abernethy, 2012 WL 1943760 (Tex. App. El Paso 2012).
- 23 Wilchombe v. TeeVee Toons, Inc., 555 F.3d 949 (11th Cir. 2009) (applying Georgia law).
- 24 Lee v. Hasson, 286 S.W.3d 1 (Tex. App. Houston 14th Dist. 2007).
- 25 In re Estate of Abernethy, 2012 WL 1943760 (Tex. App. El Paso 2012).
- 26 Lindley v. McKnight, 349 S.W.3d 113 (Tex. App. Fort Worth 2011).

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37 Am. Jur. 2d Fraud and Deceit § 38

American Jurisprudence, Second Edition | May 2021 Update

Fraud and Deceit

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II. Elements and Requisites

B. Particular Elements or Considerations

2. Relationship of Parties

§ 38. Manner of entrusting confidence; need for acceptance by party entrusted

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

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A confidential or fiduciary relationship may arise when the parties have dealt with each other in such a manner for a long period of time that one party is justified in expecting the other to act in its best interest.¹ The origin of the confidence is immaterial,² and the trust reposed may be continuous or temporary.³

Confidence alone is not enough to establish a fiduciary relationship;⁴ rather, the fact that a plaintiff reposed confidence in the defendant does not cast any duty on him or her unless the defendant voluntarily assumes a relation of personal confidence with the plaintiff.⁵ Before a person can be charged with a fiduciary obligation, he or she must either knowingly undertake to act on behalf and for the benefit of another or must enter into a relationship which imposes that undertaking as a matter of law.⁶ A confidential relationship is created, for the purposes of determining whether a fiduciary duty was undertaken by agreement, when a confidence is reposed by one person in the integrity of another, and the party in whom the confidence is reposed voluntarily accepts or assumes to accept the confidence.⁷ The fact that one party places trust or confidence in the other does not create a confidential relationship in the absence of some recognition, acceptance, or undertaking of fiduciary duties on the part of the other party.⁸

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Footnotes

¹ In re Estate of Abernethy, 2012 WL 1943760 (Tex. App. El Paso 2012).

² Brannon v. Boatmen's Nat. Bank of Oklahoma, 1999 OK CIV APP 17, 976 P.2d 1077 (Div. 4 1998); Sabhari v. Sapari, 1998 SD 35, 576 N.W.2d 886 (S.D. 1998).

³ Knapp v. American General Finance Inc., 111 F. Supp. 2d 758 (S.D. W. Va. 2000) (applying West Virginia law).

- ⁴ Knapp v. American General Finance Inc., 111 F. Supp. 2d 758 (S.D. W. Va. 2000) (applying West Virginia law).
- ⁵ BancOklahoma Mortg. Corp. v. Capital Title Co., Inc., 194 F.3d 1089 (10th Cir. 1999) (applying Missouri law); Steinert v. Winn Group, Inc., 83 F. Supp. 2d 1234 (D. Kan. 2000) (applying Kansas law); Williams-Garrett v. Murphy, 106 F. Supp. 2d 834 (D.S.C. 2000) (applying South Carolina law); Knapp v. American General Finance Inc., 111 F. Supp. 2d 758 (S.D. W. Va. 2000) (applying West Virginia law); Brannon v. Boatmen's Nat. Bank of Oklahoma, 1999 OK CIV APP 17, 976 P.2d 1077 (Div. 4 1998).
- ⁶ City of Hope Nat. Medical Center v. Genentech, Inc., 43 Cal. 4th 375, 75 Cal. Rptr. 3d 333, 181 P.3d 142 (2008).
- ⁷ Das v. Bank of America, N.A., 186 Cal. App. 4th 727, 112 Cal. Rptr. 3d 439 (2d Dist. 2010), review denied, (Oct. 13, 2010).
- ⁸ American Honda Motor Co., Inc. v. Motorcycle Information Network, Inc., 390 F. Supp. 2d 1170 (M.D. Fla. 2005) (applying Florida law).

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37 Am. Jur. 2d Fraud and Deceit § 39

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Fraud and Deceit

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II. Elements and Requisites

B. Particular Elements or Considerations

2. Relationship of Parties

§ 39. Application to particular relationships

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

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A fiduciary duty, which creates disclosure obligations, may arise formally, such as in attorney-client, partnership, and trustee relationships¹ or informally, through moral, social, domestic, or purely personal relationships of trust and confidence.² Since an attorney owes a fiduciary duty to a client, the attorney-client relationship is one of the most abundant good faith, requiring absolute perfect candor, openness, and honesty and the absence of any concealment or deception.³

The cases of parent and child, guardian and ward, trustee and cestui que trust, principal and agent, and attorney and client relationships are familiar instances in which the principle of fiduciary relationship applies in its strictest sense.⁴ Typical familial relationships are not “confidential relationships” per se unless there is specific evidence of domination and control of one family member over the other.⁵ Family relationships, where a person trusts in and relies upon a close member of his or her core family unit, may give rise to a fiduciary duty when equity requires.⁶ While family members stand in a fiduciary relationship toward one another in a co-owned business venture,⁷ subjective trust alone is not sufficient to establish a confidential relationship between family members for purposes of determining whether a fiduciary relationship exists.⁸ Moreover, contrary authority exists as to the parent-child relationship, holding that such relationship, standing alone, is insufficient to create a confidential or fiduciary relationship.⁹

The fact of a sibling relationship does not in itself create a fiduciary status¹⁰ although it may well be one of the ingredients in a situation leading to the creation of such a relationship.¹¹ Uncles and nephews do not necessarily have a confidential relationship.¹²

Friendship, affection, or even intimacy existing between two parties and the repose of confidence by one in the other does not necessarily create a confidential relationship¹³ although it may be one factor in determining that such a relationship exists.¹⁴

No confidential or fiduciary relationship exists between a public official, transacting in his or her individual capacity, and another, although there is a fiduciary relationship between the official and the governmental unit which he or she serves.¹⁵ An

affiliation between an educational institution as an employer, and tenured teachers as employees, does not create a cognizable fiduciary relationship, as is required for a constructive fraud claim.¹⁶

A fiduciary relationship does not ordinarily arise in an arm's length contractual agreement.¹⁷ The courts generally find that parties who interact at arm's length do not have a fiduciary relationship with each other even if they are mutually interdependent businesses.¹⁸ Indeed, contracting parties are generally not fiduciaries; thus, due diligence requires that each protect its own interests.¹⁹ When the parties are so circumstanced or associated in a business transaction that one party must rely on the good faith and integrity of the other, a fiduciary relationship may exist despite the absence of a blood relationship.²⁰ However, the fact that a relationship between businesspersons has been a cordial one of long duration is not evidence of a confidential relationship.²¹ The fact that one businessperson trusts another and relies upon his or her promise to perform a contract does not rise to a confidential relationship; every contract includes an element of confidence and trust that each party will faithfully perform his or her obligation under the contract.²² Moreover, no confidential relationship exists between the parties to a business transaction where the parties have always dealt with each other in arm's-length transactions and where the unfavorable terms of the transaction are evident on the face of the documents signed by the parties.²³ Indeed a fiduciary relationship does not exist where the parties deal at arm's length since there is no duty imposed on either party to protect or benefit the other.²⁴ Where the parties are negotiating in an arm's length transaction, and each party is assumed to be protecting its own interest, no fiduciary duty arises²⁵ unless provided for by contract.²⁶ Most commercial or business relationships do not rise to the level of a confidential or fiduciary relationship when the parties are dealing over an arm's-length transaction.²⁷ Also, a mere subjective trust does not transform an arm's-length transaction into a fiduciary relationship.²⁸ Accordingly, agreements giving rise to an independent contractor relationship do not automatically give rise to fiduciary obligations supporting a claim for breach of fiduciary duty since the parties in such a relationship contract at arm's length.²⁹ Also, the existence of a cost-plus construction contract does not always create a fiduciary relationship between the contractor and the owner.³⁰

The law does not generally recognize a fiduciary relationship between a lender/creditor and a borrower/debtor.³¹ Also, there is no fiduciary relationship between a franchisor and a franchisee.³² However, a distributorship agreement may, in some rare instances, create a confidential relationship out of which a duty of fiduciary care arises.³³

A vendor-vendee relationship does not, by itself, create a fiduciary or other similar relation of trust and confidence.³⁴ The general rule is that a vendor and a vendee of property are not, by virtue of such fact, placed in a confidential relationship to each other, such as would furnish the basis for a tort action of fraud but on the contrary are presumed to be dealing at arm's length.³⁵ However, a "special" relationship has been found to exist in the case of buyers and sellers of property.³⁶

CUMULATIVE SUPPLEMENT

Cases:

There is no definitive list of the "special" relationships giving rise to fiduciary duties, as would support constructive fraud claim under Indiana law, but they include attorney and client, guardian and ward, principal and agent, pastor and parishioner, and close familial relationships. [Snyder v. Smith](#), 7 F. Supp. 3d 842 (S.D. Ind. 2014).

Under Oregon law, such special relationships that give rise to a fiduciary duty include certain professional relationships in which one party has a professional obligation to protect the interests of the other party, or contractual relationships of a kind that give rise to a status upon which the general law predicates a duty independent of the terms of the contract. [Giuliano v. Anchorage Advisors, LLC](#), 2014 WL 1917949 (D. Or. 2014).

Staffing company's agreement with client to provide personnel for client in various capacities did not create special relationship of trust and confidence that gave rise to informal fiduciary relationship, for purposes of client's claim for breach of fiduciary duty arising out of company employee provided to client who managed to embezzle \$15 million from client during her tenure, absent any evidence that parties were operating on any basis other than arm's length relationship and on equal terms. [Davis-Lynch, Inc. v. Asgard Technologies, LLC](#), 472 S.W.3d 50 (Tex. App. Houston 14th Dist. 2015), reh'g overruled, (Aug. 27, 2015).

[END OF SUPPLEMENT]

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Footnotes

- ¹ [La Ventana Ranch Owners' Ass'n, Inc. v. Davis](#), 363 S.W.3d 632 (Tex. App. Austin 2011), reh'g overruled, (Feb. 1, 2012) and review denied, (Aug. 17, 2012).
- ² [§ 37](#).
- ³ [Beck v. Law Offices of Edwin J. \(Ted\) Terry, Jr., P.C.](#), 284 S.W.3d 416 (Tex. App. Austin 2009).
- ⁴ [Sheldon v. Vermonty](#), 31 F. Supp. 2d 1287 (D. Kan. 1998) (applying Kansas law); [Assilzadeh v. California Federal Bank](#), 82 Cal. App. 4th 399, 98 Cal. Rptr. 2d 176 (2d Dist. 2000).
- ⁵ [In re Estate Of Schisler](#), 316 S.W.3d 599 (Tenn. Ct. App. 2009), appeal denied, (Apr. 23, 2010) and cert. denied, 131 S. Ct. 299, 178 L. Ed. 2d 144 (2010).
- ⁶ [Young v. Fawcett](#), 376 S.W.3d 209 (Tex. App. Beaumont 2012).
- ⁷ [Braddock v. Braddock](#), 60 A.D.3d 84, 871 N.Y.S.2d 68 (1st Dep't 2009).
- ⁸ [Young v. Fawcett](#), 376 S.W.3d 209 (Tex. App. Beaumont 2012).
- ⁹ [Economopoulos v. Kolaitis](#), 259 Va. 806, 528 S.E.2d 714 (2000).
- ¹⁰ [Tidwell v. Richman](#), 127 F. Supp. 526 (S.D. Cal. 1953), judgment modified on other grounds, 234 F.2d 361 (9th Cir. 1956); [Hallam v. Gladman](#), 132 So. 2d 198 (Fla. 2d DCA 1961).
- ¹¹ [Tidwell v. Richman](#), 127 F. Supp. 526 (S.D. Cal. 1953), judgment modified on other grounds, 234 F.2d 361 (9th Cir. 1956).
- ¹² [Garcia v. Vera](#), 342 S.W.3d 721 (Tex. App. El Paso 2011).
- ¹³ [Blackburn v. Allen](#), 218 Cal. App. 2d 30, 32 Cal. Rptr. 211 (2d Dist. 1963).
- ¹⁴ [Epperly v. Johnson](#), 734 N.E.2d 1066 (Ind. Ct. App. 2000); [Kalb v. Norsworthy](#), 428 S.W.2d 701 (Tex. Civ. App. Houston 1st Dist. 1968).
- ¹⁵ [Harrell v. Powell](#), 249 N.C. 244, 106 S.E.2d 160 (1958).
- ¹⁶ [Lasher v. Albion Cent. School Dist.](#), 38 A.D.3d 1197, 833 N.Y.S.2d 791 (4th Dep't 2007).
- ¹⁷ [Morgan v. Green-Save, Inc.](#), 2 So. 3d 648 (Miss. Ct. App. 2008).
- ¹⁸ [Crumley & Associates, P.C. v. Charles Peed & Associates, P.A.](#), 730 S.E.2d 763 (N.C. Ct. App. 2012).
- ¹⁹ [Via Net v. TIG Ins. Co.](#), 211 S.W.3d 310 (Tex. 2006).
- ²⁰ [NYTCO Services, Inc. v. Wilson](#), 351 So. 2d 875, 23 U.C.C. Rep. Serv. 25 (Ala. 1977); [Stevens v. Marco](#), 147 Cal. App. 2d 357, 305 P.2d 669 (2d Dist. 1956).
- ²¹ [Gregar v. Kelly](#), 355 S.W.3d 223 (Tex. App. Houston 1st Dist. 2011).
- ²² [Gregar v. Kelly](#), 355 S.W.3d 223 (Tex. App. Houston 1st Dist. 2011).

- 23 Trevino v. Sample, 565 S.W.2d 93 (Tex. Civ. App. El Paso 1978), writ refused n.r.e., (Sept. 13, 1978).
- 24 Hogan v. Provident Life and Acc. Ins. Co., 665 F. Supp. 2d 1273 (M.D. Fla. 2009) (applying Florida law); High Valley Concrete, L.L.C. v. Sargent, 149 Idaho 423, 234 P.3d 747 (2010); Lindley v. McKnight, 349 S.W.3d 113 (Tex. App. Fort Worth 2011) (arm's-length transactions entered for the parties' mutual benefit do not establish a basis for imposing a fiduciary relationship).
- 25 Snow Pallet, Inc. v. Monticello Banking Co., 367 S.W.3d 1 (Ky. Ct. App. 2012); Camp St. Mary's Assn. of W. Ohio Conference of the United Methodist Church, Inc. v. Otterbein Homes, 176 Ohio App. 3d 54, 2008-Ohio-1490, 889 N.E.2d 1066 (3d Dist. Auglaize County 2008).
- 26 Coto Settlement v. Eisenberg, 593 F.3d 1031 (9th Cir. 2010) (applying Washington law); Dembeck v. 220 Cent. Park South, LLC, 33 A.D.3d 491, 823 N.Y.S.2d 45 (1st Dep't 2006).
- 27 Brass Metal Products, Inc. v. E-J Enterprises, Inc., 189 Md. App. 310, 984 A.2d 361 (2009); Cole v. Wellmark of South Dakota, Inc., 2009 SD 108, 776 N.W.2d 240 (S.D. 2009).
- 28 LeBlanc v. Lange, 365 S.W.3d 70 (Tex. App. Houston 1st Dist. 2011).
- 29 In re Maxxim Medical Group, Inc., 434 B.R. 660 (Bankr. M.D. Fla. 2010)(applying Florida law).
- 30 Garrison v. CC Builders, Inc., 2008 WY 34, 179 P.3d 867 (Wyo. 2008).
- 31 AM Cosmetics, Inc. v. Solomon, 67 F. Supp. 2d 312 (S.D. N.Y. 1999) (applying New York law); Knapp v. American General Finance Inc., 111 F. Supp. 2d 758 (S.D. W. Va. 2000) (applying West Virginia law); Huntington Mortg. Co. v. DeBrotta, 703 N.E.2d 160 (Ind. Ct. App. 1998) (lender/borrower); Farm Credit Services of Michigan's Heartland, P.C.A. v. Weldon, 232 Mich. App. 662, 591 N.W.2d 438 (1998); New Jersey Economic Development Authority v. Pavonia Restaurant, Inc., 319 N.J. Super. 435, 725 A.2d 1133 (App. Div. 1998); AJW Partners LLC v. Itronics Inc., 68 A.D.3d 567, 892 N.Y.S.2d 46 (1st Dep't 2009).
- 32 Akkaya v. Prime Time Transp., Inc., 45 A.D.3d 616, 845 N.Y.S.2d 827 (2d Dep't 2007); Red Roof Inns, Inc. v. Murat Holdings, L.L.C., 223 S.W.3d 676 (Tex. App. Dallas 2007) (applying Louisiana law).
No fiduciary relationship existed between a manufacturer and a franchisee or between a manufacturer and a distributor where neither the franchisee nor distributor actually reposed trust in the manufacturer. Haynes Trane Service Agency, Inc. v. American Standard, Inc., 573 F.3d 947 (10th Cir. 2009) (applying Colorado law).
- 33 Abernathy-Thomas Engineering Co. v. Pall Corp., 103 F. Supp. 2d 582 (E.D. N.Y. 2000) (applying New York law).
- 34 James v. Mercea, 152 Idaho 914, 277 P.3d 361 (2012).
- 35 Mitchell v. Ford Motor Credit Co., 68 F. Supp. 2d 1315, 40 U.C.C. Rep. Serv. 2d 744 (N.D. Ga. 1998) (applying Georgia law); Sabhari v. Sapari, 1998 SD 35, 576 N.W.2d 886 (S.D. 1998).
- 36 Epperly v. Johnson, 734 N.E.2d 1066 (Ind. Ct. App. 2000).

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A.L.R. Index, Tricks and Trickery

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37 Am. Jur. 2d Fraud and Deceit § 40

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III. Means of Perpetration

A. In General

§ 40. Modes of communication of representation

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

Fraudulently producing a false impression upon the mind of another person is the gist of deceit,¹ and where this is accomplished, it is not important whether the means of accomplishing it are the words or acts of the defendant.² In other words, if deception is accomplished, the form of deceit is immaterial.³ Equity is not concerned with the means by which fraud is done; rather, it deals with the results arising from the fraud.⁴

Fraud may be found from a variety of circumstances, and there is no general rule for determining what facts will constitute it,⁵ but it is to be found or not found according to the special circumstances of each particular case.⁶

With regard to modes of perpetration, the methods of defrauding may be broadly classified as misrepresentation, concealment, or false pretenses.⁷ The law recognizes that fraud can occur by omission and places on one who undertakes to disclose material information a duty to disclose that information fully.⁸ However, fraud cannot be the basis of an action if it appears that the party alleging the fraud had equal and ample opportunity to prevent it and yet made it possible through its failure to exercise due diligence.⁹

It does not matter, as far as the right of action is concerned, whether the means of accomplishing a deception are complex or simple, that is, a deep-laid scheme of swindling or a direct falsehood; a combined effort of a number of associates or the sole effort of a solitary individual, provided the deception is effected, and the damage complained of is the consequence of the deception.¹⁰ Fraud can consist of anything calculated to deceive, whether by a single act or a combination¹¹ or whether it be by direct falsehood or innuendo.¹²

Observation:

Misrepresentations made indirectly to an injured party can serve as the basis for an action for fraud as well as an action for negligent misrepresentation.¹³

CUMULATIVE SUPPLEMENT

Cases:

The gist of a fraudulent misrepresentation is the producing of a false impression upon the mind of the other party, and, if this result is accomplished, the means of its accomplishment are immaterial. [Sutton v. David Stanley Chevrolet, Inc., 2020 OK 87, 475 P.3d 847 \(Okla. 2020\)](#), as corrected, (Oct. 21, 2020).

[END OF SUPPLEMENT]

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Footnotes

- ¹ § 27.
- ² [Noved Realty Corp. v. A.A.P. Co., 250 A.D. 1, 293 N.Y.S. 336 \(1st Dep't 1937\)](#).
- ³ [Kaze v. Compton, 283 S.W.2d 204 \(Ky. 1955\)](#).
- ⁴ [Madison Square Garden Corp. v. Universal Pictures Co., 255 A.D. 459, 7 N.Y.S.2d 845 \(1st Dep't 1938\)](#).
- ⁵ § 1.
- ⁶ [Citizens Sav. and Loan Ass'n v. Fischer, 67 Ill. App. 2d 315, 214 N.E.2d 612 \(5th Dist. 1966\)](#).
- ⁷ [Downey v. Finucane, 205 N.Y. 251, 98 N.E. 391 \(1912\)](#).
- ⁸ [Pitts Sales, Inc. v. King World Productions, Inc., 383 F. Supp. 2d 1354 \(S.D. Fla. 2005\) \(applying Florida law\)](#).
- ⁹ [Martin v. Centre Pointe Investments, Inc., 310 Ga. App. 253, 712 S.E.2d 638 \(2011\)](#).
- ¹⁰ [Berkowitz v. Lyons, 98 N.J.L. 198, 119 A. 20 \(N.J. Ct. Err. & App. 1922\)](#); [Pennebaker v. Kimble, 126 Or. 317, 269 P. 981 \(1928\)](#).
- ¹¹ [Smith v. The Equitable, 27 F. Supp. 2d 565 \(E.D. Pa. 1998\) \(applying Pennsylvania law\)](#).
- ¹² [Delahanty v. First Pennsylvania Bank, N.A., 318 Pa. Super. 90, 464 A.2d 1243 \(1983\)](#).
- ¹³ [Gouveia v. Citicorp Person-to-Person Financial Center, Inc., 101 N.M. 572, 686 P.2d 262 \(Ct. App. 1984\)](#). As to the elements of actions for fraud and negligent misrepresentation, see §§ 22 to 30.

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III. Means of Perpetration

A. In General

§ 41. Modes of communication of representation—Words or conduct

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Fraud may be established not only by spoken or written words but by conduct covering almost the full range of human experiences.¹ Stated differently, a party need not make an affirmative statement to be liable for fraud.² Thus, fraud may consist of a misrepresentation,³ that is, the positive assertion of a falsehood;⁴ the creation of a false impression by words or acts;⁵ look, or gesture;⁶ artifice;⁷ any trick or device;⁸ or, under certain circumstances, by reckless statements made without knowing or caring whether they are true or not.⁹

Conversely, a practice may carry the capacity to mislead or deceive a reasonable person but may not be fraudulent.¹⁰

Observation:

Puffing is permissible only where an ordinary person would not be deceived by the exaggerated claims, and the ordinary person must recognize the puffery for what it is and realize that he or she is not expected to rely on the claims made.¹¹

For fraud in the inducement of an investment decision to be actionable, the affirmative intent to deceive must be shown; thus, at the very least, intentional or deceptive conduct must be shown.¹²

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Footnotes

- ¹ U.S. v. Schwab, 88 F. Supp. 2d 1275 (D. Wyo. 2000) (applying Wyoming law; active conduct or words which tend to produce an erroneous impression); *McDaniel v. Shepherd*, 577 N.E.2d 239 (Ind. Ct. App. 1991); *Reis v. Peabody Coal Co.*, 997 S.W.2d 49 (Mo. Ct. App. E.D. 1999) (applying Kentucky law); *H-D Irrigating, Inc. v. Kimble Properties, Inc.*, 2000 MT 212, 301 Mont. 34, 8 P.3d 95 (2000); *Sipa Press, Inc. v. Star-Telegram Operating, Ltd.*, 181 Misc. 2d 550, 694 N.Y.S.2d 850 (Sup 1999) (allegation of fraud in the inducement may be based on an act or conduct by a defendant that is intended to deceive the plaintiff).
- ² *Meade v. Cedarapids, Inc.*, 164 F.3d 1218 (9th Cir. 1999) (applying Oregon law).
- ³ §§ 59 to 62.
- ⁴ *Berkowitz v. Lyons*, 98 N.J.L. 198, 119 A. 20 (N.J. Ct. Err. & App. 1922); *Pennebaker v. Kimble*, 126 Or. 317, 269 P. 981 (1928).
- ⁵ *Berkowitz v. Lyons*, 98 N.J.L. 198, 119 A. 20 (N.J. Ct. Err. & App. 1922); *Pennebaker v. Kimble*, 126 Or. 317, 269 P. 981 (1928).
- ⁶ *Prime Bldg. Corp. v. Itron, Inc.*, 22 F. Supp. 2d 440 (E.D. Pa. 1998) (applying Pa. law); *Delahanty v. First Pennsylvania Bank, N.A.*, 318 Pa. Super. 90, 464 A.2d 1243 (1983).
- ⁷ *Lewin v. Long*, 70 F. Supp. 2d 534 (D.N.J. 1999) (applying Texas law).
- ⁸ *Berkowitz v. Lyons*, 98 N.J.L. 198, 119 A. 20 (N.J. Ct. Err. & App. 1922); *Pennebaker v. Kimble*, 126 Or. 317, 269 P. 981 (1928).
- ⁹ §§ 122, 122.
- ¹⁰ *Gaidon v. Guardian Life Ins. Co. of America*, 94 N.Y.2d 330, 704 N.Y.S.2d 177, 725 N.E.2d 598 (1999).
- ¹¹ *Potamkin Cadillac Corp. v. Towne Cadillac Corp.*, 592 F. Supp. 801 (S.D. N.Y. 1984).
- ¹² *Russell v. Southern National Foods, Inc.*, 754 So. 2d 1246 (Miss. 2000).

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III. Means of Perpetration

A. In General

§ 42. Modes of communication of representation—Suppression or concealment of truth

[Topic Summary](#) | [Correlation Table](#) | [References](#)

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West's Key Number Digest, [Fraud](#)  27, 28

Fraud may consist of a concealment or suppression of the truth,¹ or a suggestion of falsehood and a suppression of truth together.² It may be perpetrated by silence where there is a duty to speak³ or by half-truths calculated to mislead.⁴ Fraud encompasses any omission or concealment calculated to deceive.⁵

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Footnotes

- ¹ [Lewin v. Long](#), 70 F. Supp. 2d 534 (D.N.J. 1999) (applying Texas law); [Guilbeault v. R.J. Reynolds Tobacco Co.](#), 84 F. Supp. 2d 263 (D.R.I. 2000) (applying Rhode Island law); [Howarth v. Rockingham Pub. Co., Inc.](#), 20 F. Supp. 2d 959 (W.D. Va. 1998).
As to concealment, see §§ [194](#) to [204](#).
- ² [Citizens Sav. and Loan Ass'n v. Fischer](#), 67 Ill. App. 2d 315, 214 N.E.2d 612 (5th Dist. 1966).
- ³ [§ 198](#).
- ⁴ [§ 203](#).
- ⁵ [Farm Credit Bank of St. Louis v. Isringhausen](#), 210 Ill. App. 3d 724, 155 Ill. Dec. 235, 569 N.E.2d 235 (4th Dist. 1991).

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III. Means of Perpetration

A. In General

§ 43. Procuring breach of contract or preventing its fulfillment; fraudulent breach of contract

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[Punitive damages for interference with contract or business relationship, 44 A.L.R.4th 1078](#)

[Liability for interference with invalid or unenforceable contract, 96 A.L.R.3d 1294](#)

[Liability for procuring breach of contract, 26 A.L.R.2d 1227](#) (secs. 6, 7 superseded in part by [Liability for interference with invalid or unenforceable contract, 96 A.L.R.3d 1294](#), and sec. 45 superseded in part by [Punitive damages for interference with contract or business relationship, 44 A.L.R.4th 1078](#))

Liability for procuring a breach of contract exists where the violation of the contract has been procured by misrepresentation or fraud.¹ To prove a cause of action for breach of contract accompanied by a fraudulent act, a plaintiff must show: (1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach.² Certainly, having a contract is a prerequisite to proving a breach of contract accompanied by a fraudulent act.³ Fraud may also be predicated on the action of a contracting party in deliberately and wrongfully making it impossible for himself or herself to perform the contract.⁴

On the other hand, the fraudulent breach of a contract does not give rise to an action for fraud, and therefore, where the only fraud charged relates to a breach of the contract and not to its inducement or making, no action for fraud exists.⁵ Clearly, the breach of a void agreement is not a fraud in law.⁶

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Footnotes

- ¹ Voss v. Becko, 192 F.2d 827 (8th Cir. 1951); Klauder v. Cregar, 327 Pa. 1, 192 A. 667 (1937); Keels v. Powell, 207 S.C. 97, 34 S.E.2d 482 (1945).
- ² Armstrong v. Collins, 366 S.C. 204, 621 S.E.2d 368 (Ct. App. 2005).
- ³ Armstrong v. Collins, 366 S.C. 204, 621 S.E.2d 368 (Ct. App. 2005).
- ⁴ Masini v. Quilici, 67 Nev. 333, 218 P.2d 946 (1950).
- ⁵ Regnell v. Page, 54 A.D.2d 540, 387 N.Y.S.2d 253 (1st Dep't 1976).
- ⁶ Woolley v. Stewart, 222 N.Y. 347, 118 N.E. 847 (1918).

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III. Means of Perpetration

A. In General

§ 44. Fraudulently procuring judgment

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

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Where a judgment has been set aside for fraud in its procurement,¹ and the plaintiff can prove damage suffered on account of the obtaining of such judgment by fraud, an action may then be maintained for such damages.²

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Footnotes

¹ [Am. Jur. 2d, Judgments § 19.](#)

² [Schlotthauer v. Sanders, 153 A.D.2d 729, 545 N.Y.S.2d 196 \(2d Dep't 1989\).](#)

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III. Means of Perpetration

A. In General

§ 45. Taking unconscionable or undue advantage of another

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

Even where there is no actual fraud, courts of equity will frequently relieve against hard and unconscionable contracts that have been procured by taking advantage of the condition, circumstances, or necessities of the other party,¹ especially if such contracts are made by parties acting in a fiduciary capacity² or if the party imposed upon has a mental deficiency or weakness.³ Accordingly, fraud, wherever found and in whatever guise, will not be permitted to give an inequitable advantage to the one who has consciously perpetrated the fraud.⁴

Not all foolish transactions are fraudulent, however, and it is not the duty or within the power of the courts to relieve a person from a contract merely because it is in its terms unwise or even foolish.⁵

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Footnotes

¹ [Swiney v. Womack](#), 343 Ill. 278, 175 N.E. 419 (1931); [Griffin v. Griffin](#), 125 Vt. 425, 217 A.2d 400 (1965).

² [Gray v. Gray](#), 246 Ala. 627, 22 So. 2d 21 (1945); [Griffin v. Griffin](#), 125 Vt. 425, 217 A.2d 400 (1965).

³ § 31.

⁴ [Scarborough v. Atlantic Coast Line R. Co.](#), 178 F.2d 253, 15 A.L.R.2d 491 (4th Cir. 1949).

⁵ [Woods v. Griffin](#), 204 Ark. 514, 163 S.W.2d 322 (1942).

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III. Means of Perpetration

A. In General

§ 46. Exercise of legal right; inducing lawful or unlawful act

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West's Key Number Digest, [Fraud](#)  27, 28

On the principle that in doing a lawful thing in a lawful way no legal right is invaded,¹ actual fraud cannot be predicated upon acts which by law a party has a right to do nor upon nonperformance of acts which by law he or she is not bound to do.² Stated otherwise, there is no fraud where there is nothing done which is wrong,³ and fraud cannot be deduced or inferred from that which the law pronounces to be honest.⁴ A motive of indirect gain does not infect a transaction with fraud.⁵ Not only can fraud not be predicated upon acts which the party charged has a right by law to do,⁶ provided the party pursues such right by lawful means,⁷ but also it cannot be premised upon the nonperformance of acts which by law the party is not bound to do, whatever may be the motive, design, or purpose, either in doing or not doing the acts complained of.⁸

One who has been induced to do that which the law would have otherwise required him or her to do cannot claim to have been defrauded.⁹ On the other hand, one who by fraudulent misrepresentation induces another to do an act which would be lawful if the representation were true, but which is in fact unlawful, is liable to the other for the loss which he or she incurs in consequence of the unlawfulness of the act thus induced.¹⁰

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Footnotes

¹ Am. Jur. 2d, Actions § 48.

² Claysburg II Towers v. Benchmark Claysburg, 953 F. Supp. 861 (N.D. Ohio 1996) (applying Indiana law); Maynard v. 84 Lumber Co., 657 N.E.2d 406 (Ind. Ct. App. 1995).

³ Crosby v. Wenzoski, 164 Ga. App. 266, 296 S.E.2d 162 (1982); Meyer v. Schmidt, 135 Neb. 850, 284 N.W. 337 (1939).

⁴ First Nat. Bank v. Bryn Mawr Beach Bldg. Corp., 365 Ill. 409, 6 N.E.2d 654, 109 A.L.R. 1123 (1937); Meyer v. Schmidt, 135 Neb. 850, 284 N.W. 337 (1939); Montgomery v. Phillips Petroleum Co., 49 S.W.2d 967 (Tex. Civ. App.

Amarillo 1932), writ refused, (July 19, 1932).

5 § 33.

6 Voss v. Stranahan, 248 Mich. 390, 227 N.W. 542 (1929); Montgomery v. Phillips Petroleum Co., 49 S.W.2d 967 (Tex. Civ. App. Amarillo 1932), writ refused, (July 19, 1932); Papanikolas v. Sampson, 73 Utah 404, 274 P. 856 (1929).

7 Montgomery v. Phillips Petroleum Co., 49 S.W.2d 967 (Tex. Civ. App. Amarillo 1932), writ refused, (July 19, 1932); Papanikolas v. Sampson, 73 Utah 404, 274 P. 856 (1929).

8 State Bd. of Medical Examiners v. Morlan, 147 Fla. 695, 3 So. 2d 402 (1941); Montgomery v. Phillips Petroleum Co., 49 S.W.2d 967 (Tex. Civ. App. Amarillo 1932), writ refused, (July 19, 1932).

9 § 274.

10 Restatement Second, Torts § 557.

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III. Means of Perpetration

A. In General

§ 47. Accomplishing by fraud what one could do by lawful means; fraudulent acquisition of property to apply on debt

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

Although fraud cannot be predicated upon the doing by lawful means of that which one has a legal right to do,¹ a person will not be permitted to accomplish by fraud that which he or she would be justified in doing by lawful means. Thus, a creditor will not be allowed, by practicing a fraud, to acquire the title to the property of his or her debtor even with the purpose of crediting its value on a just debt.² Also, the giving of a false and fraudulent check in payment of the purchase price of personal property, with the intent that after obtaining possession of the property by such means, the notes of the seller, barred from collection by bankruptcy, would be offset against the purchase price without the consent of the seller, or that a discount from the purchase price would be forced in settlement, is a fraud on the seller for which he or she may rescind the sale and recover his or her property.³

Observation:

To commit fraud in pursuit of a lawful end is nevertheless to commit fraud.⁴

Footnotes

¹ § 46.

² [Ditton v. Purcell, 21 N.D. 648, 132 N.W. 347 \(1911\).](#)

³ [Ditton v. Purcell, 21 N.D. 648, 132 N.W. 347 \(1911\).](#)

⁴ [U.S. v. Krenzelo, 874 F.2d 480, 28 Fed. R. Evid. Serv. 277 \(7th Cir. 1989\).](#)

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[Enforceability of transaction entered into pursuant to referral sales arrangement](#), 14 A.L.R.3d 1420

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 58](#) (Complaint in federal court—Diversity of citizenship—Fraudulent representations and concealment in furtherance of “vanity publishing” scheme—Against publisher)

A fraud may be perpetrated by false pretenses or by any trick or device calculated to injure another,¹ or by artifice,² or scheme calculated to injure another.³ The common characteristic of cases involving fraudulent devices or false pretenses is the deprivation of another of a right, money, or property by artful and deceptive words and acts which, when the facts are known, were more or less obviously said or done with intent to defraud.⁴ In several instances, “referral sales” arrangements—a device by which purchases are induced on the representation that the cost to the buyer will be reduced by commissions the buyer will earn by referring the seller to other prospects for similar sales—have been deemed fraudulent.⁵

Although from a standpoint of civil responsibility, false pretenses may be made in numerous miscellaneous ways in diverse transactions,⁶ the most frequent occurrences of such wrongful conduct are the purchase or acquisition of goods with the preconceived intent not to pay for them,⁷ and the making of a promise with the intent at the time it is made, not to perform it.⁸

A person who has been induced by artifice to do that which the law would otherwise have compelled him or her to do cannot claim to have been defrauded.⁹

Observation:

A fraudulent scheme to obtain money cannot be deemed consummated before the perpetrators have obtained the fruits of their illegal acts.¹⁰

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Footnotes

- ¹ Downey v. Finucane, 205 N.Y. 251, 98 N.E. 391 (1912).
- ² In re Felber's Estate, 193 Or. 231, 238 P.2d 203, 31 A.L.R.2d 231 (1951).
- ³ U.S. v. Norton, 108 F.3d 133 (7th Cir. 1997).
As to conspiracy to defraud, see Am. Jur. 2d, Conspiracy § 63.
- ⁴ Cerny v. Paxton & Gallagher Co., 78 Neb. 134, 110 N.W. 882 (1907).
- ⁵ Matthews v. Aluminum Acceptance Corp., 1 Mich. App. 570, 137 N.W.2d 280 (1965); Schow v. Guardtone, Inc., 18 Utah 2d 135, 417 P.2d 643 (1966).
- ⁶ § 49.
- ⁷ §§ 55 to 58.
- ⁸ §§ 94 to 100.
- ⁹ § 274.
- ¹⁰ GLM Corp. v. Klein, 684 F. Supp. 1242 (S.D. N.Y. 1988).

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§ 49. Fraud as to nature or contents of contract or other instrument

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[Seller's liability for fraud in connection with contract for the sale of long-term dancing lessons](#), 28 A.L.R.3d 1412

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[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 187](#) (Complaint, petition, or declaration—For rescission—Fraud in procuring deed—Deed represented as being another type of instrument)

A fraudulent device, the effects of which have been frequently and consistently remedied in the courts, in the absence of negligence barring relief, is willful misstatement or conduct which deliberately gives an erroneous impression as to the nature or contents of a document or written instrument.¹ In all cases (including negotiable instruments, as between the parties), assuming the absence of facts which will create an estoppel,² or of facts negating a right to rely and disclosing negligence under the circumstances, which facts are not usually held to exist where deliberate deception or artifice is practiced,³ any willful misreading of the terms of the instrument, or willful misrepresentation, misstatement, or other misleading conduct as to its contents, is sufficient to form a basis for a charge of fraud.⁴ More particularly, if one knowingly misrepresents the contents of a writing,⁵ or if the fact is established that the signer was lulled by fraud and deceit into omitting to read the document personally, a charge of fraud is maintainable by the defendant in an action upon it by one who, or whose agent, misrepresented the contents of the document.⁶ This is particularly true where the signer is an illiterate person.⁷

CUMULATIVE SUPPLEMENT

Cases:

A party who has the capacity and opportunity to read a written contract cannot afterwards set up fraud in the procurement of his signature to the instrument based on oral representations that differ from the terms of the contract. [Raysoni v. Payless Auto Deals, LLC](#), 323 Ga. App. 583, 753 S.E.2d 313 (2013).

[END OF SUPPLEMENT]

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Footnotes

- ¹ [Am. Jur. 2d, Contracts §§ 214 to 217; Am. Jur. 2d, Deeds §§ 167 to 171; Am. Jur. 2d, Release §§ 23, 24.](#)
- ² [Hi-Pro Fish Products, Inc. v. McClure](#), 346 F.2d 497 (8th Cir. 1965); [Minneapolis Threshing Mach. Co. v. Huncovsky](#), 49 N.D. 1086, 194 N.W. 830 (1923).
- ³ [§§ 260, 261.](#)
- ⁴ [Guice v. Burrage](#), 156 F.2d 304 (C.C.A. 5th Cir. 1946) (execution of mineral deed upon false representation that the instrument was a copy of a mineral lease); [Hi-Pro Fish Products, Inc. v. McClure](#), 346 F.2d 497 (8th Cir. 1965).
- ⁵ [Mazuran v. Stefanich](#), 95 Cal. App. 327, 272 P. 772 (1st Dist. 1928); [City View Apartment & Storage Co. v. Neiss](#), 4 Ohio L. Abs. 466, 154 N.E. 161 (Ct. App. 9th Dist. Summit County 1926).
- ⁶ [B. E. Robuck, Inc. v. Walker](#), 212 Ga. 621, 94 S.E.2d 696 (1956); [Farm Bureau Mut. Ins. Co. of Ind. v. Seal](#), 134 Ind. App. 269, 179 N.E.2d 760 (1962).
- ⁷ [Smith v. Mosbarger](#), 18 Ariz. 19, 156 P. 79 (1916); [W.R. Grace & Co. v. Strickland](#), 188 N.C. 369, 124 S.E. 856, 35 A.L.R. 1296 (1924).
As to competence of a party as an element of a fraud-based cause of action, see [§ 31](#).

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§ 50. False identification or impersonation; forgery

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[Legal and Procedural Issues in Prosecutions Under Federal Statutes Relating to Offense of Identity Theft](#), 4 A.L.R. Fed. 2d 365

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[Identity Theft and Other Misuses Of Credit and Debit Cards](#), 81 Am. Jur. Proof of Facts 3d 113

[Scams and Cons](#), 74 Am. Jur. Proof of Facts 3d 63

[Liability For Wrongfully Furnishing Or Obtaining A Credit Report Under The Federal Fair Credit Reporting Act](#), 44 Am. Jur. Proof of Facts 3d 287

[Forensic Identification of Handwriting](#), 27 Am. Jur. Proof of Facts 3d 489

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[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 43](#) (Complaint, petition, or declaration—For damages—Fraud in transfer of promissory note—Misrepresentation as to promisor's identity—Forgery)

Fraud may be predicated on a false introduction or identification.¹ Forgery is a method of impersonating an owner of funds and is therefore a species of fraud.² One who represents himself or herself to be another, the owner of certain property, and who feigns to dispose of such property, commits a gross fraud.³ Also, one who aids another's impersonation by identifying a person as the person he or she claims to be is also guilty of fraud.⁴

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- ¹ [Union Co. v. Cobb](#), 73 Ohio L. Abs. 155, 136 N.E.2d 429 (Ct. App. 10th Dist. Franklin County 1955); [Raser v. Moomaw](#), 78 Wash. 653, 139 P. 622 (1914).
- ² [Eliason v. Wilborn](#), 335 Ill. 352, 167 N.E. 101, 68 A.L.R. 350 (1929), *aff'd*, 281 U.S. 457, 50 S. Ct. 382, 74 L. Ed. 962 (1930); [Union Co. v. Cobb](#), 73 Ohio L. Abs. 155, 136 N.E.2d 429 (Ct. App. 10th Dist. Franklin County 1955). As to criminal liability for false personation or forgery, see [Am. Jur. 2d, False Personation §§ 1 to 6](#); [Am. Jur. 2d, Forgery §§ 1 to 4](#).
- ³ [Montgomery Garage Co. v. Manufacturers' Liability Ins. Co.](#), 94 N.J.L. 152, 109 A. 296, 22 A.L.R. 1224 (N.J. Ct. Err. & App. 1920).
- ⁴ [Raser v. Moomaw](#), 78 Wash. 653, 139 P. 622 (1914) (identification as owner of lot).

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§ 51. False identification or impersonation; forgery—Concealment of, or misrepresentation as to, identity of purchaser or grantee

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[Concealment, misrepresentation, or mistake as regards identity of person for whom property is purchased as ground for cancellation of deed, 6 A.L.R.2d 812](#)

In negotiating for the purchase of land, a purchaser may act through an agent, keeping his or her own identity secret, and unless misrepresentations in this regard are made by the ostensible purchaser, or he or she conceals the identity of his or her principal when the agent knows that otherwise the vendor would not deal with the purchaser, there is nothing of fraud in such practice although it may be that the vendor would not have in fact made the sale if the vendor had known for whom the purchase was being made.¹ A court may refuse to decree specific performance of a contract for the sale of land, where the person with whom the vendor made the contract was in fact acting for another and the personality of the party with whom the vendor dealt was of importance to him or her, or where there are elements of trust and confidence between the parties, even though there were no misrepresentations,² although it does not follow from the fact that specific performance would not have been decreed, that equity will rescind or cancel the contract.³ However, fraud may be found to exist as a consequence of a misrepresentation of one of the parties to the contract concerning his or her identity where it is shown that the other party is peculiarly interested in having the property conveyed to a certain individual and none other; in such case, the identity of the grantee becomes a material matter and may be the foundation of an action for fraud for misrepresentations.⁴ Otherwise stated, the identity of the other party to the transaction is material if the transaction would not have been consummated had the seller known who the buyer was, and if the latter either knew, or had good reason to know, of the seller's predisposition against him or her.⁵ Thus, fraud may be predicated upon misrepresentations as to the identity of the purchaser, or as to the person for whom the ostensible purchaser acts, where the vendor would not have entered into the contract had the vendor known the true identity of the purchaser.⁶ Where a person desiring to purchase property for a certain business purpose knows that the

owner is not willing to sell the land for such purpose, and so procures a third person to purchase the land for him or her, which person conceals from the vendor the fact that he or she is acting as intermediary in the transaction, the vendor may have the contract set aside or rescinded.⁷

A representation by the vendee that the vendee is the sole owner of a mercantile business operated under a firm name, when in fact the vendee is only a partner in the business, has been held sufficient to entitle the vendor to rescind the contract.⁸

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- ¹ Lenman v. Jones, 222 U.S. 51, 32 S. Ct. 18, 56 L. Ed. 89 (1911); Hall v. Bollen, 148 Ky. 20, 145 S.W. 1136 (1912); Payne v. Jennings, 144 Va. 126, 131 S.E. 209, 48 A.L.R. 628 (1926).
- ² Am. Jur. 2d, Specific Performance § 68.
- ³ Miller v. Fulmer, 25 Pa. Super. 106, 1904 WL 3394 (1904).
- ⁴ Walker v. Galt, 171 F.2d 613, 6 A.L.R.2d 808 (5th Cir. 1948); Ash Grove Lime & Portland Cement Co. v. White, 361 Mo. 1111, 238 S.W.2d 368 (1951); Pennebaker v. Kimble, 126 Or. 317, 269 P. 981 (1928).
- ⁵ Barnes v. Eastern & Western Lumber Co., 205 Or. 553, 287 P.2d 929 (1955).
- ⁶ Walker v. Galt, 171 F.2d 613, 6 A.L.R.2d 808 (5th Cir. 1948); White Tower Management Corp. v. Taglino, 302 Mass. 453, 19 N.E.2d 700, 121 A.L.R. 1158 (1939); Ash Grove Lime & Portland Cement Co. v. White, 361 Mo. 1111, 238 S.W.2d 368 (1951).
As to cancellation of a deed on this ground, see Am. Jur. 2d, Cancellation of Instruments §§ 13 to 18.
- ⁷ White Tower Management Corp. v. Taglino, 302 Mass. 453, 19 N.E.2d 700, 121 A.L.R. 1158 (1939); Ash Grove Lime & Portland Cement Co. v. White, 361 Mo. 1111, 238 S.W.2d 368 (1951).
- ⁸ New York Brokerage Co. v. Wharton, 143 Iowa 61, 119 N.W. 969 (1909).

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§ 52. Enticement into jurisdiction

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[Right of action for fraud, duress, or the like, causing instant plaintiff to release or compromise a cause of action against third person, 58 A.L.R.2d 500](#)

If a person is induced by artifice, fraud, or misrepresentation to come within the jurisdiction of a court for the purpose of obtaining service of process, not only will the service be set aside on motion¹ but also an action for damages may be maintained for the deceit.²

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Footnotes

¹ [Am. Jur. 2d, Process §§ 48 to 54.](#)

² [Sweet v. Kimball, 166 Mass. 332, 44 N.E. 243 \(1896\).](#)
As to a nonresident's right to recovery for being induced by fraud to come into the state so that he or she could be arrested, see [Am. Jur. 2d, Arrest § 115.](#)

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§ 53. Inducement to forgo enforcement of remedy

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[Fraud and deceit: Liability in damages for preventing bringing of action before its being barred by statute of limitations, 33 A.L.R.3d 1077](#)

The loss, due to fraud and deceit, of a right of action against one causing the death of a person, may be the basis for the recovery of substantial damages.¹ Where the parties stand in a relation of trust and confidence to one another, one who is induced to stay action by false representations can recover for the fraud notwithstanding that any right of action ex contractu is unenforceable because the statutory period of limitation has elapsed.²

On the other hand, it has been held that no action lies for fraudulently preventing a person injured by another's negligence from bringing an action therefor within the time allowed by the statute of limitations since the basis of recovery would be purely speculative.³ However, there is contrary authority holding that the maintenance of such an action is permissible and that the damages resulting from the fraud are not too remote and conjectural to be remediable.⁴ The view has been expressed that false representations inducing one to refrain from instituting a civil action where the necessity for timely institution of the action is known will not support an action for fraud and deceit.⁵

In diverse cases, a majority of the courts have held or recognized that where one having an enforceable legal right is fraudulently prevented from bringing an action thereon until barred by a statute of limitations, a cause of action will lie for the loss suffered in consequence⁶ although under the particular circumstances of several cases, a negative position has been taken with respect to the maintainability of such an action.⁷

A creditor cannot maintain an action against a third party for fraudulent representations inducing the creditor merely to

refrain from taking steps to collect the debt until collection has become impossible.⁸

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Footnotes

- ¹ Ware v. State Farm Mut. Auto. Ins. Co., 181 Kan. 291, 311 P.2d 316 (1957); Inman v. Merchants Mut. Cas. Co., 274 A.D. 320, 83 N.Y.S.2d 801 (3d Dep't 1948).
- ² Ott v. Hood, 152 Wis. 97, 139 N.W. 762 (1913) (attorney and client).
- ³ Whitman v. Seaboard Air Line Ry., 107 S.C. 200, 92 S.E. 861 (1917).
- ⁴ Urtz v. New York Cent. & H.R.R. Co., 202 N.Y. 170, 95 N.E. 711 (1911).
As to misrepresentation and fraud as affecting the running of the statute of limitations, see Am. Jur. 2d, Limitation of Actions §§ 164 to 168, 373 to 376.
- ⁵ Jackson v. Jackson, 313 S.W.2d 868 (Ky. 1958).
- ⁶ West v. Western Cas. and Sur. Co., 846 F.2d 387 (7th Cir. 1988) (applying Illinois law); Wilder v. Meyer, 779 F. Supp. 164 (S.D. Fla. 1991) (applying Florida law); Firemen's Ins. Co. of Newark, N. J. v. Jones, 245 Ark. 179, 431 S.W.2d 728, 33 A.L.R.3d 1059 (1968); Muraoka v. Budget Rent-A-Car, Inc., 160 Cal. App. 3d 107, 206 Cal. Rptr. 476 (2d Dist. 1984).
- ⁷ Werman v. Malone, 750 F. Supp. 21 (D. Me. 1990) (applying Maine law); Skipper v. U. S. Fidelity & Guaranty Co., 448 F. Supp. 74 (D.S.C. 1978) (applying South Carolina law); Beeck v. Kapalis, 302 N.W.2d 90 (Iowa 1981).
- ⁸ Miller v. Bank of Commerce, 387 S.W.2d 691 (Tex. Civ. App. Fort Worth 1965).

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§ 54. Fraudulently procuring settlement or release

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[Insurer's tort liability for acts of adjuster seeking to obtain settlement or release, 39 A.L.R.3d 739](#)

[Right of action for fraud, duress, or the like, causing instant plaintiff to release or compromise a cause of action against third person, 58 A.L.R.2d 500](#)

Where a right of action exists, and the defendant, or someone for him or her, by fraudulent representations induces the plaintiff to make a settlement or release of his or her cause for an inadequate sum, the plaintiff may either avoid the settlement or release and sue on his or her original right of action¹ or may sue in fraud and deceit and recover such amount as will make the settlement an honest one.² It is also a general rule that where a wrongdoer fraudulently conceals his or her wrong from the injured person, who agrees, in ignorance of the wrong, to a settlement of the accounts of the wrongdoer and the entry of a judgment or judicial decree in accordance with the agreement, the decree does not defeat an action for damages resulting from the fraud.³ In the absence of knowledge of fraud in the inducement of a compromise agreement, such agreement cannot be set up by the defense to an action for the fraud on the theory that the agreement released the defendant from the fraud.⁴ Moreover, a compromise agreement settling a judgment is held not to defeat a cause of action for damages for fraud in inducing the settlement even though no affidavit is taken as to the financial condition of the judgment debtor.⁵ However, there are differing views on whether an action can be maintained to recover damages for fraud practiced upon the plaintiff in inducing him or her to execute a release to the defendant for personal injuries, some jurisdictions holding that the claim cannot be maintained since the fraud complained of renders the release invalid, and the original cause of action, therefore, remains to the plaintiff.⁶ Similarly, an action for deceit for fraudulently inducing the execution of a release will not lie unless rescission will not fully protect the releasor.⁷ Where the limitation of time within which an action must be brought is a limitation of the right and not of the remedy, an action may not be maintained, after the expiration of such time, for fraud

in obtaining a release whereby the plaintiff lost the value of his or her cause of action, in the absence of any proof of damages other than those flowing from the original wrongful act.⁸ However, other courts have stated that the remedy of rescission is rarely adequate because the plaintiffs are often prejudiced by delay in having their claims adjudicated, and that damages for fraud are conceptually different from damages for the underlying tort claims and are not too speculative to calculate, and permit the action for fraud to be maintained; for these reasons, the claim is permissible.⁹

Under the prevailing view, an action for fraud and deceit may be predicated on misrepresentations by which one is induced to release or compromise a cause of action against a third person.¹⁰

Observation:

Although an injured party may be obligated to tender a return of the consideration received for signing a release as a prerequisite to rescission on any ground other than fraud, there is no requirement that a cause of action for rescission must be joined with one for damages for fraud¹¹ or that the consideration must be tendered back in order to maintain an action for fraud.¹²

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Footnotes

- ¹ As to fraud as a ground for invalidating a compromise and settlement, see generally [Am. Jur. 2d, Compromise and Settlement §§ 32, 33](#).
As to fraud vitiating a release and rescission or cancellation of the release for fraud, see [Am. Jur. 2d, Release §§ 23, 24](#).
- ² [Sade v. Northern Natural Gas Co.](#), 483 F.2d 230 (10th Cir. 1973) (applying Oklahoma law); [Farm Bureau Mut. Ins. Co. of Ind. v. Seal](#), 134 Ind. App. 269, 179 N.E.2d 760 (1962).
- ³ [Ross v. Preston](#), 292 N.Y. 433, 55 N.E.2d 490 (1944).
- ⁴ [Brooklyn Nat. Bank of N.Y. v. Werblow](#), 263 A.D. 884, 32 N.Y.S.2d 169 (2d Dep't 1942).
- ⁵ [Deutsch v. Roy](#), 239 A.D. 714, 268 N.Y.S. 606 (1st Dep't 1934), *aff'd*, 269 N.Y. 508, 199 N.E. 510 (1935).
- ⁶ [Lomax v. Southwest Missouri Electric Ry. Co.](#), 106 Mo. App. 551, 81 S.W. 225 (1904).
- ⁷ [Shallenberger v. Motorists Mut. Ins. Co.](#), 167 Ohio St. 494, 5 Ohio Op. 2d 173, 150 N.E.2d 295 (1958).
- ⁸ [Wichita Falls & S. R. Co. v. Durham](#), 132 Tex. 143, 120 S.W.2d 803, 120 A.L.R. 1497 (Comm'n App. 1938).
- ⁹ [Matsuura v. Alston & Bird](#), 166 F.3d 1006 (9th Cir. 1999), opinion amended on other grounds on denial of reh'g, 179 F.3d 1131 (9th Cir. 1999).
- ¹⁰ [Indiana Ins. Co. v. Handlon](#), 216 Ind. 442, 24 N.E.2d 1003 (1940); [Ware v. State Farm Mut. Auto. Ins. Co.](#), 181 Kan. 291, 311 P.2d 316 (1957).
- ¹¹ [Byrnes v. National Union Ins. Co.](#), 34 A.D.2d 872, 310 N.Y.S.2d 781 (3d Dep't 1970).
- ¹² [Morta v. Korea Ins. Corp.](#), 840 F.2d 1452 (9th Cir. 1988); [Byrnes v. National Union Ins. Co.](#), 34 A.D.2d 872, 310 N.Y.S.2d 781 (3d Dep't 1970).

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C. Obtaining Goods or Services with Intent Not to Pay

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37 Am. Jur. 2d Fraud and Deceit § 55

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III. Means of Perpetration

C. Obtaining Goods or Services with Intent Not to Pay

§ 55. Generally

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Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 225](#) (Instruction to jury—Fraud in securing property—Purchase with intent not to pay)

It is an act of fraud to purchase or obtain goods with a preconceived intention not to pay for them,¹ and the same is true with purchasing or obtaining services.² To obtain goods on credit with the intent not to pay for them is as much a trick or device as it would be to falsely represent in words any material fact whereby the vendor would be induced to part with them.³

It is an act of fraud to procure money as a loan through a fraudulent scheme with the preconceived intention not to repay the loan.⁴

The rationale underlying the general rule has been stated as either that an application for credit is a representation of the existence of an intent to pay at a future time and a representation of the nonexistence of an intent not to pay⁵ so that the fraud consists in the express or implied false representation of such an intention, the promise being a false means whereby the fraud is effected.⁶ Other jurisdictions hold that the fraud consists in the concealment of the intention not to pay and that such concealment is conduct that reasonably involves a false representation of an existing fact, and that is not less material than a misrepresentation of the ability to pay and is an actual artifice, intended and fitted to deceive.⁷

False representations that will justify the rescission of a contract of sale and a concealment of an intention not to pay for the goods purchased are separate and distinct wrongs.⁸

Footnotes

- ¹ In re White, 221 F. Supp. 64 (N.D. Cal. 1963) (applying California law); Flaherty v. Schettino, 136 Conn. 222, 70 A.2d 151 (1949); Waller Peanut Co. v. Lee County Peanut Co., 209 S.W.2d 405 (Tex. Civ. App. Austin 1948).
- ² Erskine v. Chevrolet Motors Co., 185 N.C. 479, 117 S.E. 706, 32 A.L.R. 196 (1923); Hunt v. Lewis, 87 Vt. 528, 90 A. 578 (1914).
- ³ Kritzer v. Moffat, 136 Wash. 410, 240 P. 355, 44 A.L.R. 681 (1925).
- ⁴ Security Trust Co. of Rochester v. Voxakis, 67 Misc. 2d 143, 323 N.Y.S.2d 810 (Sup 1971).
- ⁵ Cerny v. Paxton & Gallagher Co., 78 Neb. 134, 110 N.W. 882 (1907); Waller Peanut Co. v. Lee County Peanut Co., 209 S.W.2d 405 (Tex. Civ. App. Austin 1948).
- ⁶ Cerny v. Paxton & Gallagher Co., 78 Neb. 134, 110 N.W. 882 (1907); Kritzer v. Moffat, 136 Wash. 410, 240 P. 355, 44 A.L.R. 681 (1925).
- ⁷ Erskine v. Chevrolet Motors Co., 185 N.C. 479, 117 S.E. 706, 32 A.L.R. 196 (1923).
- ⁸ German Nat. Bank of Ripon v. Princeton State Bank, 128 Wis. 60, 107 N.W. 454 (1906).

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§ 56. Intention not to pay as essence

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Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 225](#) (Instruction to jury—Fraud in securing property—Purchase with intent not to pay)

In every case in which the predication of fraud is based upon purchase or acquisition with the intent not to pay, the indispensable element to successful maintenance of the charge is the intention not to pay, and the proper inquiry is whether there was a preconceived design not to pay for the goods.¹ In more explicit language, to support a charge of fraud where a buyer is silent as to his or her financial condition and practices no artifice or deceit, the evidence must sustain a finding, or warrant the conclusion of law, that the buyer intended not to pay for the goods.² On the other hand, a mere inability to pay the price when due under the agreement does not constitute fraud³ and so is a failure to pay the price when due.⁴

A relevant point of inquiry in cases involving an intent not to pay is the time when the intent not to pay must have existed in order to constitute a fraudulent device. It is generally held that the intention not to pay for goods purchased must have existed at the time the purchase was made; in other words, the only intent that renders the sale fraudulent is a positive and predetermined intention never to pay for the goods, entertained and acted upon at the time of going through the forms of an apparent sale.⁵

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Footnotes

¹ [Manly v. Ohio Shoe Co.](#), 25 F.2d 384, 59 A.L.R. 413 (C.C.A. 4th Cir. 1928); [Putterman v. Goldman](#), 197 Wis. 233,

221 N.W. 650 (1928).

² German Nat. Bank of Ripon v. Princeton State Bank, 128 Wis. 60, 107 N.W. 454 (1906).

³ German Nat. Bank of Ripon v. Princeton State Bank, 128 Wis. 60, 107 N.W. 454 (1906).
As to the effect of insolvency of the purchaser, see § 58.

⁴ Flaherty v. Schettino, 136 Conn. 222, 70 A.2d 151 (1949).

⁵ German Nat. Bank of Ripon v. Princeton State Bank, 128 Wis. 60, 107 N.W. 454 (1906).

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§ 57. Effect of lack of reasonable expectation of ability to pay

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There is a conflict of authority as to whether the fact that a purchaser of goods has no reasonable expectation of being able to pay for them is equivalent to an intention on his or her part not to pay for them, some courts holding that it is equivalent to such an intention,¹ particularly where coupled with insolvency and concealment thereof.² Other courts hold directly to the contrary³ even though the purchaser is insolvent and conceals that fact from the seller.⁴

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Footnotes

¹ [Manly v. Ohio Shoe Co.](#), 25 F.2d 384, 59 A.L.R. 413 (C.C.A. 4th Cir. 1928); [Luhrig Coal Co. v. Ludlum](#), 69 Ohio St. 311, 69 N.E. 562 (1903).

As to the presumption of an intent not to pay from a lack of reasonable expectation of being able to pay, see [§ 465](#).

² [§ 58](#).

³ [German Nat. Bank of Ripon v. Princeton State Bank](#), 128 Wis. 60, 107 N.W. 454 (1906).

⁴ [§ 58](#).

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§ 58. Effect of insolvency and concealment thereof, or act of bankruptcy

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The rule that an acquisition of goods with the intent not to pay therefor is fraudulent is particularly applicable where the purchaser is insolvent and conceals that fact from the seller.¹ The rule has been held to obtain where a person's indebtedness, to his or her knowledge, largely exceeds in amount the value of his or her property; and where the person did not intend or expect to pay and has no reasonable expectation of paying;² and where he or she is insolvent or in failing circumstances and has a preconceived intention not to pay for the goods, or no reasonable expectation of being able to do so, and fraudulently conceals or misrepresents the facts.³ Thus, concealment of insolvency, with no reasonable expectation of paying, renders a sale fraudulent.⁴

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Footnotes

- ¹ Manly v. Ohio Shoe Co., 25 F.2d 384, 59 A.L.R. 413 (C.C.A. 4th Cir. 1928); J. J. Smith Lumber Co. v. Scott County Garbage Reducing & Fuel Co., 149 Iowa 272, 128 N.W. 389 (1910).
As to the presumption of an intent not to pay, from insolvency, see § 465.
- ² Luhrig Coal Co. v. Ludlum, 69 Ohio St. 311, 69 N.E. 562 (1903).
- ³ Manly v. Ohio Shoe Co., 25 F.2d 384, 59 A.L.R. 413 (C.C.A. 4th Cir. 1928).
- ⁴ Manly v. Ohio Shoe Co., 25 F.2d 384, 59 A.L.R. 413 (C.C.A. 4th Cir. 1928).

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IV. False Representations

A. In General

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IV. False Representations

A. In General

§ 59. Generally

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[Employer's liability, under state law, for fraud or misrepresentation inducing employee to take early retirement, 14 A.L.R.5th 537](#)

[Computer sales and leases: breach of warranty, misrepresentation, or failure of consideration as defense or ground for affirmative relief, 37 A.L.R.4th 110](#)

Trial Strategy

[Real-Estate Broker's Misrepresentation or Nondisclosure as to Condition or Value of Realty, 39 Am. Jur. Proof of Facts 3d 309](#)

[Fraudulent Representations Inducing the Purchase of a Small Business, 30 Am. Jur. Proof of Facts 3d 1](#)

[Misrepresentation in Automobile Sales, 13 Am. Jur. Trials 253](#)

False representations undoubtedly constitute the most frequent basis for actions in fraud and deceit, as well as for equitable relief on the ground of fraud.¹ As a general rule, making a false representation or misrepresentation of fact is one of the elements of an action for fraud.² Determinations as to the materiality³ and falsity⁴ of a statement are issues which determine whether a particular statement is actionable for fraud.

False and fraudulent misrepresentations by a seller as to the subject matter of the contract may constitute fraud for which the buyer may maintain an action for damages or rescind the sale, and as a general rule, every willful misrepresentation by the seller in respect to a fact, which affords a material inducement to the sale and operates to deceive the buyer, may be made the basis of a charge of fraud.⁵ Furthermore, a purchaser, although ordinarily under no duty to speak unless in a confidential relationship, must refrain from making false and deceitful statements in respect to the vendor's property in order to induce the vendor to sell it.⁶

Fraudulent representations may play a dual role. They may be the basis for an independent action for fraud; they may also, in equity, be a basis for an equitable estoppel⁷ barring the defendant from invoking the statute of limitations against a cause of action⁸ for breach of fiduciary relations.⁹

Observation:

The Restatement Second, Torts defines when a misrepresentation is fraudulent in terms of the knowledge or belief of the maker; thus, a misrepresentation is fraudulent if the maker: (1) knows or believes that the matter is not as he or she represents it to be; (2) does not have the confidence in the accuracy of his or her representation that the maker states or implies; or (3) knows that he or she does not have the basis for his or her representation that the maker states or implies.¹⁰ The Restatement Second, Contracts takes a similar approach but adds the qualification that the maker must also intend to induce a party to manifest his or her assent.¹¹ With respect to a representation which the maker knows to be capable of two interpretations, one of which he or she knows to be false and the other true, is fraudulent, under the Restatement Second of Torts, if it is made: (1) with the intention that it be understood in the sense in which it is false, or (2) without any belief or expectation as to how it will be understood, or (3) with reckless indifference as to how it will be understood.¹²

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- ¹ Adams v. Gillig, 199 N.Y. 314, 92 N.E. 670 (1910); Alabiso v. Schuster, 273 A.D. 655, 80 N.Y.S.2d 314 (4th Dep't 1948).
- ² § 24.
Necessity that representation be of fact, see §§ 63 to 83.
- ³ §§ 227 to 230.
- ⁴ §§ 106 to 108.
- ⁵ Standard Motors Finance Co. v. Mitchell Auto Co., 173 Ark. 875, 293 S.W. 1026, 57 A.L.R. 877 (1927); Stallings v. Moore, 73 S.W.2d 562 (Tex. Civ. App. Fort Worth 1934); Mayer v. Rankin, 91 Utah 193, 63 P.2d 611, 110 A.L.R. 837 (1936).
- ⁶ Crompton v. Beedle, 83 Vt. 287, 75 A. 331 (1910).
- ⁷ Erbe v. Lincoln Rochester Trust Co., 13 A.D.2d 211, 214 N.Y.S.2d 849 (4th Dep't 1961).
- ⁸ Am. Jur. 2d, Limitation of Actions § 408.
- ⁹ Erbe v. Lincoln Rochester Trust Co., 13 A.D.2d 211, 214 N.Y.S.2d 849 (4th Dep't 1961).
- ¹⁰ § 119.

¹¹ [Restatement Second, Contracts § 162\(1\)](#).
As to intent to induce reliance, see [§ 110](#).

¹² [Restatement Second, Torts § 527](#).

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IV. False Representations

A. In General

§ 60. Manner of making; implied representations

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[Civil liability of witness falsely attesting signature to document, 96 A.L.R.2d 1346](#)

[Misrepresentations as to financial condition or credit of third person as actionable by one extending credit in reliance thereon, 32 A.L.R.2d 184](#)

Although it has been observed that there can generally be no fraud without an express misrepresentation,¹ a misrepresentation may, but need not, be express;² it may be implied³ or inferable from circumstances that are in fact equivalent to a positive representation.⁴ Representations may be made by words,⁵ i.e., an affirmative statement that is itself false;⁶ by acts and conduct⁷ which communicate a representation that is false and material;⁸ or by concealing or not disclosing certain facts which render the facts that are disclosed misleading.⁹

Observation:

Some jurisdictions treat concealment of any facts that one has an obligation to disclose with the intent to defraud as having the same legal effect as an affirmative misrepresentation¹⁰ while relieving a defendant of liability in tort on the basis of actual fraud or intentional concealment in the absence of a duty to disclose.¹¹

The exhibiting of fraudulent documents¹² or attesting of an instrument without seeing it signed¹³ is a representation. A recital of fact in a written memorandum of a contract is also regarded to be in the nature of a representation;¹⁴ however, writing or presenting an insufficient funds check is not a false statement or misrepresentation as a check is neither a statement nor a representation.¹⁵

CUMULATIVE SUPPLEMENT

Cases:

A statement that misleadingly omits critical facts is a fraudulent misrepresentation irrespective of whether the other party has expressly signaled the importance of the qualifying information. [Universal Health Services, Inc. v. U.S., 136 S. Ct. 1989 \(2016\)](#).

A person conveying a false impression by disclosing some facts and concealing others is guilty of fraud, even though the statement is true as far as it goes; the concealment is in effect a false representation that what is disclosed is the whole truth. [Croslin v. Enerlex, Inc., 2013 OK 34, 308 P.3d 1041 \(Okla. 2013\)](#).

[END OF SUPPLEMENT]

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- ¹ [Lilliston v. Regions Bank, 288 Ga. App. 241, 653 S.E.2d 306 \(2007\)](#).
- ² [Jewell v. Seaboard Indus., Inc., 667 So. 2d 653, 28 U.C.C. Rep. Serv. 2d 168 \(Ala. 1995\)](#); [Kuhn v. Seaton, 187 Kan. 106, 353 P.2d 959 \(1960\)](#); [Weikel v. Sterns, 142 Ky. 513, 134 S.W. 908 \(1911\)](#); [Nota Const. Corp. v. Keyes Associates, Inc., 45 Mass. App. Ct. 15, 694 N.E.2d 401 \(1998\)](#).
- ³ [Jewell v. Seaboard Indus., Inc., 667 So. 2d 653, 28 U.C.C. Rep. Serv. 2d 168 \(Ala. 1995\)](#); [Thrifty-Tel, Inc. v. Bezenek, 46 Cal. App. 4th 1559, 54 Cal. Rptr. 2d 468 \(4th Dist. 1996\)](#); [Nota Const. Corp. v. Keyes Associates, Inc., 45 Mass. App. Ct. 15, 694 N.E.2d 401 \(1998\)](#).
- ⁴ [Kuhn v. Seaton, 187 Kan. 106, 353 P.2d 959 \(1960\)](#); [Eastern Trust & Banking Co. v. Cunningham, 103 Me. 455, 70 A. 17 \(1908\)](#); [McCray Refrigerator Co. v. Uramoto, 79 Nev. 294, 382 P.2d 600, 96 A.L.R.2d 1339 \(1963\)](#).
- ⁵ [Thrifty-Tel, Inc. v. Bezenek, 46 Cal. App. 4th 1559, 54 Cal. Rptr. 2d 468 \(4th Dist. 1996\)](#); [Brody v. Bock, 897 P.2d 769 \(Colo. 1995\)](#); [Travers v. Spidell, 682 A.2d 471 \(R.I. 1996\)](#); [Claman v. Popp, 2012 WY 92, 279 P.3d 1003 \(Wyo. 2012\)](#).
- ⁶ [Jane Doe 43C v. Diocese of New Ulm, 787 N.W.2d 680 \(Minn. Ct. App. 2010\)](#); [National Union Fire Ins. Co. of Pittsburgh, P.A. v. Red Apple Group, Inc., 273 A.D.2d 140, 710 N.Y.S.2d 48 \(1st Dep't 2000\)](#); [Hardin v. KCS Intern., Inc., 199 N.C. App. 687, 682 S.E.2d 726 \(2009\)](#).
- ⁷ [Kmart, Inc. v. Asaro, 751 So. 2d 513 \(Ala. Civ. App. 1999\) \(conduct\)](#); [Thrifty-Tel, Inc. v. Bezenek, 46 Cal. App. 4th 1559, 54 Cal. Rptr. 2d 468 \(4th Dist. 1996\)](#); [Haberstick v. Gordon A. Gundaker Real Estate Co., Inc., 921 S.W.2d 104 \(Mo. Ct. App. E.D. 1996\)](#); [Claman v. Popp, 2012 WY 92, 279 P.3d 1003 \(Wyo. 2012\)](#).
- ⁸ [Smallwood v. Fisk, 146 Or. App. 695, 934 P.2d 557 \(1997\)](#).
- ⁹ [BCCI Holdings \(Luxembourg\) Societe Anonyme v. Khalil, 56 F. Supp. 2d 14 \(D.D.C. 1999\)](#), *aff'd in part, rev'd in part and remanded on other grounds*, [214 F.3d 168 \(D.C. Cir. 2000\)](#) (applying District of Columbia law);

Seckinger-Lee Co. v. Allstate Ins. Co., 32 F. Supp. 2d 1348 (N.D. Ga. 1998) (applying Georgia law); Doe v. Archdiocese of St. Paul & Minneapolis, 801 N.W.2d 203 (Minn. Ct. App. 2011), review granted, (Sept. 20, 2011) and rev'd on other grounds, 817 N.W.2d 150 (Minn. 2012).

¹⁰ Banco Nacional Ultramarino, S.A. v. Chan, 169 Misc. 2d 182, 641 N.Y.S.2d 1006 (Sup 1996), order aff'd, 240 A.D.2d 253, 659 N.Y.S.2d 734 (1st Dep't 1997).

For the purpose of establishing a negligent misrepresentation claim, the element of an affirmative representation by defendant may consist of nonverbal conduct under certain circumstances. Shaw v. Brown & Williamson Tobacco Corp., 973 F. Supp. 539 (D. Md. 1997) (applying Maryland law).

As to what constitutes concealment and when a duty to disclose exists, see §§ 194 to 226.

¹¹ Harding County, S.D. v. Frithiof, 575 F.3d 767 (8th Cir. 2009) (applying South Dakota law).

¹² Eisert v. Town of Hempstead, 918 F. Supp. 601 (E.D. N.Y. 1996) (applying New York law); Bundesen v. Lewis, 291 Ill. App. 83, 9 N.E.2d 327 (1st Dist. 1937), judgment rev'd on other grounds, 368 Ill. 623, 15 N.E.2d 520 (1938) (maps or plats).

¹³ McCray Refrigerator Co. v. Uramoto, 79 Nev. 294, 382 P.2d 600, 96 A.L.R.2d 1339 (1963).

¹⁴ Corry v. Sylvia y Cia, 192 Ala. 550, 68 So. 891 (1915).

¹⁵ Wadsworth, Inc. v. Schwarz-Nin, 951 F. Supp. 314 (D.P.R. 1996) (applying Puerto Rico law).

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IV. False Representations

A. In General

§ 61. Construction of language used

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The scope of particular representations is a matter of construction. In the construction of a representation, the language used is to be interpreted by the effect that it would produce upon an ordinary mind,¹ and words will be given their usual and natural meaning² since that is the sense in which the person using them must be presumed to have intended them to be understood.³ Consideration will be given to the nature of the representation and the meaning of the language used as applied to the subject matter and as interpreted by the surrounding circumstances.⁴ Statements comprising an alleged misrepresentation must be viewed in their entirety to adequately resolve the question of whether a misrepresentation has occurred.⁵ A plaintiff must exercise ordinary intelligence to determine the truth or real quality of the subject of a representation.⁶

Where the evidence relied upon to prove fraud is equally consistent with innocence, that construction must be placed upon it which will exonerate the accused party.⁷

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Footnotes

¹ Downey v. Finucane, 205 N.Y. 251, 98 N.E. 391 (1912).

² Monier v. Guaranty Trust Co. of New York, 82 F.2d 252, 104 A.L.R. 912 (C.C.A. 2d Cir. 1936).

³ Davis v. Louisville Trust Co., 181 F. 10 (C.C.A. 6th Cir. 1910).

⁴ Mortarino v. Consultant Engineering Services, Inc., 251 Va. 289, 467 S.E.2d 778 (1996).

⁵ Wilson v. First Union Nat. Bank of Georgia, 716 So. 2d 722 (Ala. Civ. App. 1998).

⁶ Madison Home Equities, Inc. v. Echeverria, 266 A.D.2d 435, 698 N.Y.S.2d 703 (2d Dep't 1999).

⁷ § 483.

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IV. False Representations

A. In General

§ 62. Questions of law and fact

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No hard and fast rule can be laid down as to what constitutes a fraudulent representation in any particular case. The result, of necessity, depends upon the peculiar circumstances and conditions involved.¹

Questions for the jury arise when one attempts to prove the specific facts with reference to a representation, which must be proved in establishing fraud in the making of such representation.² Issues of fact are presented upon a conflict in the evidence as to whether a representation alleged to have been made by the party charged with fraud was in fact made by that party³ and whether it was false.⁴ Ambiguity in a representation presents questions of fact for determination by the jury as to the meaning of the statement and the meaning which the person making it intended it should convey to the person to whom it was made.⁵

On the other hand, the question whether a representation is actionable as a fraud or deceit of which cognizance is taken by the court for the purpose of a grant of relief may be entirely one of law⁶ as where it appears without dispute in the evidence that the representation was only a statement of the opinion or belief of the person making it, not to be relied upon as a statement of fact.⁷ Moreover, the materiality of a false representation may sometimes be determined by the court as a question of law.⁸

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Footnotes

¹ [Bareham & McFarland v. Kane](#), 228 A.D. 396, 240 N.Y.S. 123 (4th Dep't 1930).

² [Monsanto Chemical Works v. American Zinc, Lead & Smelting Co.](#), 253 S.W. 1006 (Mo. 1923).

³ [Monsanto Chemical Works v. American Zinc, Lead & Smelting Co.](#), 253 S.W. 1006 (Mo. 1923); [Halsey v. Minnesota-South Carolina Land & Timber Co.](#), 174 S.C. 97, 177 S.E. 29, 100 A.L.R. 1 (1934).

⁴ [Worcester Felt Pad Corp. v. Tucson Airport Authority](#), 233 F.2d 44, 59 A.L.R.2d 1121 (9th Cir. 1956); [Roberts v. James](#), 83 N.J.L. 492, 85 A. 244 (N.J. Ct. Err. & App. 1912).

⁵ §§ 106, 109.

⁶ [Monsanto Chemical Works v. American Zinc, Lead & Smelting Co., 253 S.W. 1006 \(Mo. 1923\).](#)

⁷ § 70.

⁸ § 230.

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1. In General

§ 63. Generally

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As a general rule, in order to constitute actionable fraud, a false representation must relate to a past¹ or present² (sometimes referred to as “existing”³ or “preexisting”)⁴ material⁵ fact.⁶ A representation that relates to future conduct is generally not actionable.⁷ However, a promise to do an act in the future, when coupled with a present intent not to fulfill the promise, has been recognized as an exception to the general rule that a misrepresentation must relate to an existing or past fact.⁸

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Footnotes

¹ Trooien v. Mansour, 608 F.3d 1020 (8th Cir. 2010) (applying Minnesota law); National Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Services Group, Inc., 171 Cal. App. 4th 35, 89 Cal. Rptr. 3d 473 (1st Dist. 2009); Clinton County ex rel. Bd. of Com'rs of County of Clinton v. Clements, 945 N.E.2d 721 (Ind. Ct. App. 2011), transfer denied, 962 N.E.2d 643 (Ind. 2011); Flegles, Inc. v. TruServ Corp., 289 S.W.3d 544 (Ky. 2009); Kurtzenacker v. Davis Surveying, Inc., 2012 MT 105, 365 Mont. 71, 278 P.3d 1002 (2012); Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of America, 341 S.W.3d 323 (Tex. 2011).

² Trooien v. Mansour, 608 F.3d 1020 (8th Cir. 2010) (applying Minnesota law); Clinton County ex rel. Bd. of Com'rs of County of Clinton v. Clements, 945 N.E.2d 721 (Ind. Ct. App. 2011), transfer denied, 962 N.E.2d 643 (Ind. 2011); Flegles, Inc. v. TruServ Corp., 289 S.W.3d 544 (Ky. 2009); Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of America, 341 S.W.3d 323 (Tex. 2011).

³ Petrohawk Properties, L.P. v. Chesapeake Louisiana, L.P., 689 F.3d 380 (5th Cir. 2012) (applying Louisiana law); Bennett v. MIS Corp., 607 F.3d 1076 (6th Cir. 2010) (applying Michigan law); National Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Services Group, Inc., 171 Cal. App. 4th 35, 89 Cal. Rptr. 3d 473 (1st Dist. 2009); Clinton County ex rel. Bd. of Com'rs of County of Clinton v. Clements, 945 N.E.2d 721 (Ind. Ct. App. 2011), transfer denied, 962 N.E.2d 643 (Ind. 2011); Valspar Refinish, Inc. v. Gaylord's, Inc., 764 N.W.2d 359, 68 U.C.C.

Rep. Serv. 2d 567 (Minn. 2009); Kurtzenacker v. Davis Surveying, Inc., 2012 MT 105, 365 Mont. 71, 278 P.3d 1002 (2012); Flandera v. AFA America, Inc., 78 A.D.3d 1639, 913 N.Y.S.2d 441 (4th Dep't 2010); Sales v. Kecoughtan Housing Co., Ltd., 279 Va. 475, 690 S.E.2d 91 (2010).

⁴ Pearson v. Garrett-Evangelical Theological Seminary, Inc., 790 F. Supp. 2d 759, 272 Ed. Law Rep. 947 (N.D. Ill. 2011) (applying Illinois law); Supervalu, Inc. v. Johnson, 276 Va. 356, 666 S.E.2d 335 (2008).

⁵ Republic Bank & Trust Co. v. Bear Stearns & Co., Inc., 683 F.3d 239 (6th Cir. 2012) (applying Kentucky law); Trooien v. Mansour, 608 F.3d 1020 (8th Cir. 2010) (applying Minnesota law); Lawson v. Harris Culinary Enterprises, LLC, 83 So. 3d 483 (Ala. 2011); National Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Services Group, Inc., 171 Cal. App. 4th 35, 89 Cal. Rptr. 3d 473 (1st Dist. 2009); Clinton County ex rel. Bd. of Com'rs of County of Clinton v. Clements, 945 N.E.2d 721 (Ind. Ct. App. 2011), *transfer denied*, 962 N.E.2d 643 (Ind. 2011); Kurtzenacker v. Davis Surveying, Inc., 2012 MT 105, 365 Mont. 71, 278 P.3d 1002 (2012).

⁶ Republic Bank & Trust Co. v. Bear Stearns & Co., Inc., 683 F.3d 239 (6th Cir. 2012) (applying Kentucky law); Trooien v. Mansour, 608 F.3d 1020 (8th Cir. 2010) (applying Minnesota law); Lawson v. Harris Culinary Enterprises, LLC, 83 So. 3d 483 (Ala. 2011); National Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Services Group, Inc., 171 Cal. App. 4th 35, 89 Cal. Rptr. 3d 473 (1st Dist. 2009); American United Life Ins. Co. v. Douglas, 808 N.E.2d 690 (Ind. Ct. App. 2004).

⁷ §§ 84, 85, 86.

⁸ § 94.

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IV. False Representations

B. Necessity that Representation Be of Fact; Opinions

1. In General

§ 64. What constitutes statement of fact

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Neither a statement of policy¹ nor a casual expression of belief² is equivalent to a representation of fact, and thus, no claim for fraud may be maintained on such a statement as a false representation of facts. Moreover, no claim of fraud may be made if it rests on a representation of a religious doctrine or belief, even if insincerely made, since the Federal Constitution's First Amendment prohibits courts from determining the veracity of religious tenets.³

As a predicate for a fraud action, a representation must be definite; mere vague, general, or indefinite statements are insufficient.⁴

Caution:

An omission may constitute a material representation for purposes of determining fraud.⁵

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Footnotes

¹ [Martens v. Minnesota Min. & Mfg. Co.](#), 616 N.W.2d 732 (Minn. 2000) (employer's dual ladder system for compensating and promoting technical and administrative employees).

² Vega v. Jones, Day, Reavis & Pogue, 121 Cal. App. 4th 282, 17 Cal. Rptr. 3d 26 (2d Dist. 2004).

³ Tilton v. Marshall, 925 S.W.2d 672 (Tex. 1996).

⁴ Shroyer v. New Cingular Wireless Services, Inc., 622 F.3d 1035 (9th Cir. 2010) (applying California law); Pig Imp. Co., Inc. v. Middle States Holding Co., 943 F. Supp. 392, 31 U.C.C. Rep. Serv. 2d 422 (D. Del. 1996); Tate v. Colony House Builders, Inc., 257 Va. 78, 508 S.E.2d 597 (1999).

⁵ In re House of Drugs, Inc., 251 B.R. 206 (Bankr. D. N.J. 2000) (applying New Jersey law).
As to concealment, generally, see §§ 194 to 226.

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1. In General

§ 65. Exception as to expression of opinion; what constitutes opinion, generally

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[Misrepresentations as to financial condition or credit of third person as actionable by one extending credit in reliance thereon, 32 A.L.R.2d 184](#)

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 219](#) (Instruction—Expression of opinion not a representation)

The principle is fundamental that fraud cannot be predicated upon the mere expression of an opinion,¹ which is understood by the representee to be only that² or which cannot reasonably be understood to be anything else.³ This rule applies to representations in regard to matters of judgment,⁴ estimate,⁵ guess,⁶ and probability,⁷ as well as to projections and expectations.⁸ Mere exaggeration is not actionable as fraud.⁹ The person to whom such statements are made has no right to rely upon them and he or she does so at his or her peril,¹⁰ and it cannot be supposed that they influenced his or her judgment.¹¹ Additionally, expressions of opinion are insufficient to authorize a recovery for fraudulent misrepresentation because such expressions are deemed not to be material to a transaction.¹²

There are qualifications and exceptions to these general rules,¹³ each one growing out of the need of preventing the successful

perpetration of fraud.¹⁴

CUMULATIVE SUPPLEMENT

Cases:

Under New York law, for a credit rating to be actionable as a misrepresentation, a plaintiff must allege that the holder of the opinion reflected in the rating did not believe the opinion at the time that it was made. [Tolin v. Standard & Poor's Financial Services, LLC](#), 950 F. Supp. 2d 714 (S.D. N.Y. 2013).

[END OF SUPPLEMENT]

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Footnotes

- ¹ [Mutual Life Ins. Co. of New York v. Phinney](#), 178 U.S. 327, 20 S. Ct. 906, 44 L. Ed. 1088 (1900); [Catskill Development, L.L.C. v. Park Place Entertainment Corp.](#), 547 F.3d 115 (2d Cir. 2008) (applying New York law); [Ussery v. Children's Healthcare of Atlanta, Inc.](#), 289 Ga. App. 255, 656 S.E.2d 882 (2008); [American United Life Ins. Co. v. Douglas](#), 808 N.E.2d 690 (Ind. Ct. App. 2004); [Gore v. Scotland Golf, Inc.](#), 136 S.W.3d 26 (Tex. App. San Antonio 2003).
- ² [Mutual Life Ins. Co. of New York v. Phinney](#), 178 U.S. 327, 20 S. Ct. 906, 44 L. Ed. 1088 (1900).
- ³ [Finch v. McKee](#), 18 Cal. App. 2d 90, 62 P.2d 1380 (3d Dist. 1936); [Nye Odorless Incinerator Corp. v. Felton](#), 35 Del. 236, 162 A. 504 (Super. Ct. 1931); [Kennedy v. Flo-Tronics, Inc.](#), 274 Minn. 327, 143 N.W.2d 827 (1966); [Wilson v. Jones](#), 45 S.W.2d 572 (Tex. Comm'n App. 1932).
- ⁴ [Rodowicz v. Massachusetts Mut. Life Ins. Co.](#), 192 F.3d 162 (1st Cir. 1999), as amended, (Nov. 3, 1999) (applying Massachusetts law); [Grove v. Principal Mut. Life Ins. Co.](#), 14 F. Supp. 2d 1101 (S.D. Iowa 1998) (applying Iowa law); [Peterson v. Daka Intern., Inc.](#), 61 F. Supp. 2d 634 (E.D. Mich. 1999) (applying Texas law).
- ⁵ [Rodowicz v. Massachusetts Mut. Life Ins. Co.](#), 192 F.3d 162 (1st Cir. 1999), as amended, (Nov. 3, 1999) (applying Massachusetts law); [Finch v. McKee](#), 18 Cal. App. 2d 90, 62 P.2d 1380 (3d Dist. 1936); [Wilson v. Jones](#), 45 S.W.2d 572 (Tex. Comm'n App. 1932).
- ⁶ [Han v. Horwitz](#), 2 Ariz. App. 245, 407 P.2d 786 (1965) (statement by a land salesman that holes in the ground were caused by rock collectors).
Negligent misrepresentation does not occur, under Texas law, when a defendant simply makes a guess as to a future unknown event. [In re Absolute Resource Corp.](#), 76 F. Supp. 2d 723 (N.D. Tex. 1999).
- ⁷ [Razdan v. General Motors Corp.](#), 979 F. Supp. 755 (N.D. Ill. 1997), judgment aff'd, 234 F.3d 1273 (7th Cir. 2000) (applying Illinois law); [Peterson v. Daka Intern., Inc.](#), 61 F. Supp. 2d 634 (E.D. Mich. 1999) (applying Texas law).
- ⁸ §§ 84, 85.
- ⁹ [Little Caesar Enterprises, Inc. v. OPPCO, LLC](#), 219 F.3d 547, 2000 FED App. 0229P (6th Cir. 2000) (applying Michigan law).
- ¹⁰ § 252.
- ¹¹ [Sorrells v. Clifford](#), 23 Ariz. 448, 204 P. 1013 (1922); [Tate v. Colony House Builders, Inc.](#), 257 Va. 78, 508 S.E.2d 597 (1999); [Gardner v. Gardner](#), 190 Wis. 2d 216, 527 N.W.2d 701 (Ct. App. 1994).

¹² VNA Plus, Inc. v. Apria Healthcare Group, Inc., 29 F. Supp. 2d 1253 (D. Kan. 1998) (applying Missouri law).

¹³ §§ 71 to 78.

¹⁴ Nye Odorless Incinerator Corp. v. Felton, 35 Del. 236, 162 A. 504 (Super. Ct. 1931); Hogan v. McCombs Bros., 190 Iowa 650, 180 N.W. 770 (1921).

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IV. False Representations

B. Necessity that Representation Be of Fact; Opinions

2. Distinctions Between Statements of Fact and Opinion

§ 66. Generally

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Some jurisdictions state the test for whether a statement is one of opinion or of fact as whether under the circumstances surrounding the statement, the representation was intended and understood as one of fact as distinguished from one of opinion.¹ Stated alternately, a statement that in form is one of opinion may constitute a “statement of fact” if it may reasonably be understood by the recipient as implying that there are facts to justify the opinion or at least that there are no facts that are incompatible with it.²

Other jurisdictions state that whether statements are to be considered as matters of fact or matters of opinion depend on whether the person to whom they are made may rightly rely upon them.³

The prevailing perspective, however, appears to be that there is no certain rule which can be applied in order to determine when false representations constitute matters of opinion or matters of fact but that each case must in a large measure be adjudged upon its own facts,⁴ taking into consideration the nature of the representation and the meaning of the language used as applied to the subject matter in the light of the surrounding circumstances.⁵ Stated similarly, whether a statement is an actionable statement of fact or merely one of opinion often depends on the circumstances and context in which a statement is made,⁶ and among the relevant circumstances are the statement's specificity, the speaker's knowledge, the comparative levels of the speaker's and the hearer's knowledge, and whether the statement relates to the present or the future.⁷ Under yet another formulation of the rule, the relative knowledge of the parties, their intentions, and all of the surrounding circumstances affect the interpretation which courts put upon representations in determining whether they are representations of fact or opinion.⁸

When it is impossible to determine as a matter of law whether the representation is one of fact or merely the expression of an opinion, the question is generally regarded as one for the jury.⁹

CUMULATIVE SUPPLEMENT

Cases:

Whether a statement is an actionable statement of fact, as would support a fraud claim, or merely one of opinion often depends on the circumstances in which a statement is made; relevant circumstances include the statement's specificity, the speaker's knowledge, the comparative levels of the speaker's and the hearer's knowledge, and whether the statement relates to the present or the future. [O'Brien v. Daboval](#), 388 S.W.3d 826 (Tex. App. Houston 1st Dist. 2012).

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Footnotes

- ¹ [Omega Engineering, Inc. v. Eastman Kodak Co.](#), 908 F. Supp. 1084, 30 U.C.C. Rep. Serv. 2d 194 (D. Conn. 1995) (applying Connecticut law).
- ² [McEneaney v. Chestnut Hill Realty Corp.](#), 38 Mass. App. Ct. 573, 650 N.E.2d 93 (1995).
- ³ [Holland Furnace Co. v. Korth](#), 43 Wash. 2d 618, 262 P.2d 772, 41 A.L.R.2d 1166 (1953); [Madison Trust Co. v. Helleckson](#), 216 Wis. 443, 257 N.W. 691, 96 A.L.R. 992 (1934) (statements made to induce a release of liability for wrongful death).
As to the effect of confidential relationships, generally, see §§ 34 to 39.
As to reliance, generally, see §§ 231 to 262.
- ⁴ [Fidelity & Casualty Co. of New York v. J.D. Pittman Tractor Co.](#), 244 Ala. 354, 13 So. 2d 669 (1943); [Foreman & Clark Corp. v. Fallon](#), 3 Cal. 3d 875, 92 Cal. Rptr. 162, 479 P.2d 362 (1971); [Arkoma Basin Exploration Co., Inc. v. FMF Associates 1990-A, Ltd.](#), 249 S.W.3d 380 (Tex. 2008) (applying Virginia law); [Mortarino v. Consultant Engineering Services, Inc.](#), 251 Va. 289, 467 S.E.2d 778 (1996).
- ⁵ [VNA Plus, Inc. v. Apria Healthcare Group, Inc.](#), 29 F. Supp. 2d 1253 (D. Kan. 1998) (applying Missouri law); [Tate v. Jackson](#), 22 Ill. App. 2d 471, 161 N.E.2d 156 (4th Dist. 1959); [Russo v. Williams](#), 160 Neb. 564, 71 N.W.2d 131 (1955); [Murphy v. McIntosh](#), 199 Va. 254, 99 S.E.2d 585 (1957).
- ⁶ [Constance v. B.B.C. Development Co.](#), 25 S.W.3d 571 (Mo. Ct. App. W.D. 2000).
- ⁷ [GJP, Inc. v. Ghosh](#), 251 S.W.3d 854 (Tex. App. Austin 2008).
- ⁸ [Arkoma Basin Exploration Co., Inc. v. FMF Associates 1990-A, Ltd.](#), 249 S.W.3d 380 (Tex. 2008) (applying Virginia law).
- ⁹ § 70.

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IV. False Representations

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2. Distinctions Between Statements of Fact and Opinion

§ 67. Belief or judgment of maker or recipient; Restatement definition

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According to the Restatement Second, Torts, a representation is one of opinion if it expresses only: (1) the belief of the maker, without certainty, as to the existence of a fact; or (2) his or her judgment as to quality, value, authenticity, or other matters of judgment.¹ This “belief” has been characterized as a “casual belief” by some courts.² The Restatement Second, Contracts takes a similar approach, stating that an assertion is one of opinion if it expresses only a belief, without certainty, as to the existence of a fact or expresses only a judgment as to quality, value, authenticity, or similar matters.³

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¹ [Restatement Second, Torts § 538A.](#)

² [Anderson v. Deloitte & Touche, 56 Cal. App. 4th 1468, 66 Cal. Rptr. 2d 512 \(1st Dist. 1997\).](#)

³ [Restatement Second, Contracts § 168\(1\).](#)

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2. Distinctions Between Statements of Fact and Opinion

§ 68. Representation of matter susceptible of knowledge

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To be actionable, a representation must relate to a fact that is susceptible of knowledge;¹ otherwise, there is nothing in relation to which the person making such representation could state what he or she knew to be untrue.²

The distinction between fact and opinion is broadly indicated by the generalization that what was susceptible of exact knowledge when the statement was made is usually considered to be a matter of fact.³ Representations in regard to matters not susceptible of definite knowledge are generally to be regarded as mere expressions of opinion⁴ even where they are made positively and as though they are based on the maker's own knowledge.⁵ Usually, also, to say that a thing is only a matter of opinion imports that it is unsusceptible of proof⁶ or that it cannot be verified.⁷ Conversely, a statement is factual where it deals with existing, quantifiable data.⁸

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Footnotes

¹ Jensen v. Taco John's Intern., Inc., 110 F.3d 525 (8th Cir. 1997) (applying Minnesota law); Greenleaf Arms Realty Trust I, LLC v. New Boston Fund, Inc., 81 Mass. App. Ct. 282, 962 N.E.2d 221 (2012), review denied, 462 Mass. 1107, 969 N.E.2d 718 (2012); Constance v. B.B.C. Development Co., 25 S.W.3d 571 (Mo. Ct. App. W.D. 2000) (susceptible of exact knowledge).

² Sorrells v. Clifford, 23 Ariz. 448, 204 P. 1013 (1922); Kennedy v. Flo-Tronics, Inc., 274 Minn. 327, 143 N.W.2d 827 (1966); Patterson v. Bushong, 196 S.W. 962 (Tex. Civ. App. Fort Worth 1917), writ refused, (June 5, 1918).

³ Nota Const. Corp. v. Keyes Associates, Inc., 45 Mass. App. Ct. 15, 694 N.E.2d 401 (1998) (actual knowledge); Reis v. Peabody Coal Co., 997 S.W.2d 49 (Mo. Ct. App. E.D. 1999); Bishop Logging Co. v. John Deere Indus. Equipment Co., 317 S.C. 520, 455 S.E.2d 183, 28 U.C.C. Rep. Serv. 2d 190 (Ct. App. 1995).

⁴ Radioshack Corp. v. ComSmart, Inc., 222 S.W.3d 256 (Ky. Ct. App. 2007).

⁵ Nye Odorless Incinerator Corp. v. Felton, 35 Del. 236, 162 A. 504 (Super. Ct. 1931).

⁶ Nye Odorless Incinerator Corp. v. Felton, 35 Del. 236, 162 A. 504 (Super. Ct. 1931); Coons v. Bank of Commerce, 233 Ky. 457, 26 S.W.2d 15 (1930); Colorado Milling & Elevator Co. v. Rapides Grocery Co., 142 So. 626 (La. Ct. App. 2d Cir. 1932).

⁷ VNA Plus, Inc. v. Apria Healthcare Group, Inc., 29 F. Supp. 2d 1253 (D. Kan. 1998) (applying Missouri law).

⁸ Peter J. Hartmann Co. v. Capital Bank and Trust Co., 296 Ill. App. 3d 593, 230 Ill. Dec. 830, 694 N.E.2d 1108 (1st Dist. 1998).

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2. Distinctions Between Statements of Fact and Opinion

§ 69. Form of statement

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The mere form in which a statement is made is not necessarily determinative as to whether it is a statement of fact or an expression of opinion. Thus, the mere fact that a statement takes the form of an expression of opinion is not always conclusive¹ but may be a relevant factor, among others, to consider.² A statement may be so expressed as to bind the person making it to its truth though it may be stated in the form of an opinion.³ A statement that is in form a mere opinion, or the conclusion of the speaker, may import that the speaker knows that facts exist that support the speaker's conclusion and that the speaker does not know of the existence of facts which, if known, would cast doubt upon it.⁴ Conversely, that a matter which necessarily rests in opinion is stated positively does not make it a statement of fact.⁵

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Footnotes

¹ [Wade v. Chase Manhattan Mortg. Corp.](#), 994 F. Supp. 1369 (N.D. Ala. 1997), [aff'd](#), 132 F.3d 1461 (11th Cir. 1997) (applying Alabama law); [Anderson v. Deloitte & Touche](#), 56 Cal. App. 4th 1468, 66 Cal. Rptr. 2d 512 (1st Dist. 1997); [McEneaney v. Chestnut Hill Realty Corp.](#), 38 Mass. App. Ct. 573, 650 N.E.2d 93 (1995).

² [Wade v. Chase Manhattan Mortg. Corp.](#), 994 F. Supp. 1369 (N.D. Ala. 1997), [aff'd](#), 132 F.3d 1461 (11th Cir. 1997) (applying Alabama law); [Fisher v. Davidhizar](#), 2011 UT App 270, 263 P.3d 440 (Utah Ct. App. 2011).

³ [Gray v. Richmond Bicycle Co.](#), 167 N.Y. 348, 60 N.E. 663 (1901); [Holcomb & Hoke Mfg. Co. v. Auto Interurban Co.](#), 140 Wash. 581, 250 P. 34, 51 A.L.R. 39 (1926).

⁴ § 72.

⁵ [Fidelity & Casualty Co. of New York v. J.D. Pittman Tractor Co.](#), 244 Ala. 354, 13 So. 2d 669 (1943).

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2. Distinctions Between Statements of Fact and Opinion

§ 70. Questions of law or fact

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While, as a general rule, the question as to whether a particular statement is one of fact or opinion is for the jury, this is not always so, for cases frequently arise that are so plainly of one class or the other that they can be disposed of by the court without the aid of the jury.¹ It is, however, often impossible to state as a matter of law whether a statement is an expression of the opinion of the speaker or a representation of fact to be relied upon as made within his or her knowledge, and when such is the case, the question is one of fact.²

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Footnotes

¹ [Batchelder v. Birchard Motors, Inc.](#), 120 Vt. 429, 144 A.2d 298 (1958).

² [Thompson v. United Companies Lending Corp.](#), 699 So. 2d 169 (Ala. Civ. App. 1997); [Pacific Gas & Elec. Co. v. Almanzo](#), 22 Ariz. 431, 198 P. 457 (1921); [Foreman & Clark Corp. v. Fallon](#), 3 Cal. 3d 875, 92 Cal. Rptr. 162, 479 P.2d 362 (1971).
As to the status of particular representations as statements of fact or opinion, see §§ [137](#) to [193](#).

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There are many qualifications and modifications of the rule that actionable fraud cannot be based upon the mere expression of an opinion.¹ Frequently, a false assertion of even an opinion will amount to a fraud where under the circumstances the other party has a right to rely upon what is stated or represented.² Thus, an expression of opinion may amount to fraud where it is a mere contrivance of fraud, where the person to whom it was expressed has justly relied upon it and been misled,³ or where it is coupled with other circumstances,⁴ such as active fraud or concealment.⁵ Statements of opinion may be actionable fraud where the party making the representation does so with the intent to prevent the party relying thereon from making an independent investigation of the facts.⁶

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Footnotes

¹ [Rochester Bridge Co. v. McNeill](#), 188 Ind. 432, 122 N.E. 662 (1919); [Madison Trust Co. v. Helleckson](#), 216 Wis. 443, 257 N.W. 691, 96 A.L.R. 992 (1934).

² [Bell v. Lamborn](#), 2 F.2d 205 (C.C.A. 4th Cir. 1924); [Bushey v. Coffman](#), 103 Kan. 209, 173 P. 341 (1918); [Murph v. Foxworth](#), 93 S.W.2d 817 (Tex. Civ. App. Galveston 1936).

³ [Amazon v. Davidson](#), 390 So. 2d 383 (Fla. 5th DCA 1980); [Rochester Bridge Co. v. McNeill](#), 188 Ind. 432, 122 N.E. 662 (1919); [Murph v. Foxworth](#), 93 S.W.2d 817 (Tex. Civ. App. Galveston 1936).

⁴ [Rochester Bridge Co. v. McNeill](#), 188 Ind. 432, 122 N.E. 662 (1919).

⁵ [Amazon v. Davidson](#), 390 So. 2d 383 (Fla. 5th DCA 1980); [Gray v. Richmond Bicycle Co.](#), 167 N.Y. 348, 60 N.E.

663 (1901).

⁶ [Baker v. United Services Auto. Ass'n](#), 661 So. 2d 128 (Fla. 1st DCA 1995).

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§ 72. Where opinion imports knowledge of supporting facts; opinion stated as fact

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The mere fact that a statement takes the form of an expression of opinion is not always conclusive, and a statement may be so expressed as to bind the person making it to its truth although stated in the form of an opinion.¹ A statement that is in form mere opinion, or the conclusion of the speaker, may import that the speaker knows that facts exist that support the conclusion² and that the speaker does not know of the existence of facts which, if known, would cast doubt upon it.³ In actions for misrepresentation or deceit, even though a matter asserted is an opinion, it is actionable if the maker is aware of present facts incompatible with that opinion.⁴ Otherwise stated, a statement of opinion may support fraud liability where the speaker has knowledge of facts not warranting the opinion.⁵

When the facts are not equally known to both parties, a statement of opinion by one who knows the facts better often involves a statement of material fact that justifies the opinion such that an action for fraud may be predicated upon the statement.⁶

Observation:

According to the view taken in the Restatement Second, Torts, a statement of opinion as to facts not disclosed and not otherwise known to the recipient may, if it is reasonable to do so, be interpreted by the recipient as an implied statement either that the facts known to the maker are not incompatible with his or her opinion or that he or she knows facts sufficient to justify him or her in forming it. In determining whether a statement of opinion may reasonably be so interpreted, the recipient's belief as to whether the maker has an adverse interest is important.⁷

Where a party states a matter that might otherwise be only an opinion and does not state it as the mere expression of his or her own opinion but as an existing fact material to a transaction so that the other party may reasonably treat it as a fact and rely and act upon it as such, then the statement becomes an affirmation of fact.⁸ However, even where it is held that expressions of opinion may constitute fraudulent representations, it is so held because the person making them believes differently at the time from the way he or she expresses the opinion.⁹

CUMULATIVE SUPPLEMENT

Cases:

For the common-law tort of misrepresentation, a statement of opinion as to facts not disclosed and not otherwise known to the recipient may in some circumstances reasonably be interpreted by him as an implied statement that the speaker knows facts sufficient to justify him in forming the opinion, or that he at least knows no facts incompatible with the opinion. [Restatement \(Second\) of Torts § 539](#). [Omnicare, Inc. v. Laborers Dist. Council Const. Industry Pension Fund](#), 135 S. Ct. 1318 (2015).

[END OF SUPPLEMENT]

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Footnotes

¹ § 69.

² [Arthur D. Little Intern., Inc. v. Dooyang Corp.](#), 928 F. Supp. 1189 (D. Mass. 1996) (applying Massachusetts law); [Grove Holding Corp. v. First Wisconsin Nat. Bank of Sheboygan](#), 12 F. Supp. 2d 885, 41 Fed. R. Serv. 3d 1595 (E.D. Wis. 1998) (applying Wisconsin law; misrepresentation claim); [Commercial Sav. Bank of Carroll, Iowa v. Kietges](#), 206 Iowa 90, 219 N.W. 44 (1928).

³ [Arthur D. Little Intern., Inc. v. Dooyang Corp.](#), 928 F. Supp. 1189 (D. Mass. 1996) (applying Massachusetts law); [Poole v. Camden](#), 79 W. Va. 310, 92 S.E. 454 (1916).

⁴ [McEneaney v. Chestnut Hill Realty Corp.](#), 38 Mass. App. Ct. 573, 650 N.E.2d 93 (1995); [General Star Indem. Co. v. Bankruptcy Estate of Lake Geneva Sugar Shack, Inc. by Waldschmidt](#), 215 Wis. 2d 104, 572 N.W.2d 881 (Ct. App. 1997).

⁵ [People v. Webb](#), 74 Cal. App. 4th 688, 88 Cal. Rptr. 2d 259 (2d Dist. 1999).

⁶ [Thompson v. United Companies Lending Corp.](#), 699 So. 2d 169 (Ala. Civ. App. 1997).
As to relationships which may give rise to trust and confidence so as to permit reliance on a misrepresentation, see §§ 76, 77, 78.

⁷ [Restatement Second, Torts § 539](#).
The Restatement Second, Contracts takes a similar view, stating that if it is reasonable to do so, the recipient of an assertion of a person's opinion as to facts not disclosed and not otherwise known to the recipient may properly interpret it as an assertion: (a) that the facts known to that person are not incompatible with his or her opinion; or (b) that he or she knows facts sufficient to justify him or her in forming it. [Restatement Second, Contracts § 168\(2\)](#).

⁸ [Hale v. Wolfson](#), 276 Cal. App. 2d 285, 81 Cal. Rptr. 23 (1st Dist. 1969); [Bergman and Lefkow Ins. Agency v. Flash Cab Co.](#), 110 Ill. App. 2d 415, 249 N.E.2d 729 (1st Dist. 1969).

⁹ [Automobile Underwriters v. Rich](#), 222 Ind. 384, 53 N.E.2d 775 (1944).

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§ 73. Mingling of fact and opinion

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It is not necessary, to constitute fraud, that all the representations made in a transaction be statements of fact.¹ It is immaterial that some of the false representations do not separately or collectively constitute an actionable statement of fact; that some are matters of opinion will not preclude relief.² It is sufficient if there are any misrepresentations of material facts made with knowledge of their falsity and the intention that they should be relied upon, which constitute a substantial factor in inducing the transaction.³ Stated otherwise, the general rule that the expression of an opinion cannot constitute fraud does not apply if in addition to expressing an opinion, material facts have been fraudulently concealed.⁴

A representation of knowledge of the particular facts upon which an expression of opinion is based, which facts are unknown to the representee, constitutes a misrepresentation of fact if false.⁵ A statement that by itself might be a mere expression of opinion may be so connected with a statement of a material fact as to amount to fraud.⁶ As the rule has otherwise been stated, there is an exception to the general rule that opinions are not actionable in fraud where the statement of opinion is so intertwined with other misstatements of fact that the representation as a whole amounts to a false representation of fact.⁷ If the opinion misrepresents the facts upon which it is based or implies the existence of facts that are nonexistent, it constitutes an actual misrepresentation,⁸ and the same may be true of a false opinion that is not honestly entertained and is material to the transaction when considered with other inducements, or where it is accompanied by active misrepresentation or related to a subject as to which the parties have no knowledge or means of ascertaining the proof.⁹

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Footnotes

¹ [Lake v. Thompson](#), 366 Pa. 352, 77 A.2d 364 (1951).

- ² Lake v. Thompson, 366 Pa. 352, 77 A.2d 364 (1951).
- ³ Lake v. Thompson, 366 Pa. 352, 77 A.2d 364 (1951).
- ⁴ Reis v. Peabody Coal Co., 997 S.W.2d 49 (Mo. Ct. App. E.D. 1999) (applying Kentucky law).
- ⁵ Wilke v. Coinway, Inc., 257 Cal. App. 2d 126, 64 Cal. Rptr. 845 (1st Dist. 1967); Pacific Mut. Life Ins. Co. v. Ernst & Young & Co., 10 S.W.3d 798 (Tex. App. Dallas 2000), judgment rev'd on other grounds, 51 S.W.3d 573 (Tex. 2001); Holcomb & Hoke Mfg. Co. v. Auto Interurban Co., 140 Wash. 581, 250 P. 34, 51 A.L.R. 39 (1926).
- ⁶ Pocatello Security Trust Co. v. Henry, 35 Idaho 321, 206 P. 175, 27 A.L.R. 337 (1922); Trenholm v. Ratcliff, 646 S.W.2d 927 (Tex. 1983) (direct representations of present facts were so intertwined with the future prediction that the whole statement amounted to a representation of facts).
- ⁷ Allen v. Devon Energy Holdings, L.L.C., 367 S.W.3d 355 (Tex. App. Houston 1st Dist. 2012), petition for review filed, (May 23, 2012).
- ⁸ People v. Webb, 74 Cal. App. 4th 688, 88 Cal. Rptr. 2d 259 (2d Dist. 1999).
- ⁹ Wilke v. Coinway, Inc., 257 Cal. App. 2d 126, 64 Cal. Rptr. 845 (1st Dist. 1967).

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§ 74. Opinion deliberately given falsely with intent to deceive

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The expression of an opinion not in reality entertained may constitute actionable fraud where it is stated falsely and with intent to deceive.¹ Redress may be had for the dishonest expression of an opinion contrary to that really entertained by the speaker, especially if he or she is an apparently disinterested third person or if a deliberately false opinion is expressed in terms importing personal knowledge of its truth.² Otherwise stated, a statement purporting to be an opinion may be the basis for fraud if, at the time it is made, the maker of the statement holds an opinion contrary to the opinion he or she expresses, and the maker also intends to deceive the listener.³ Yet another formulation of the rule is that where a speaker gives an opinion when he or she is aware of facts incompatible with such opinion, the opinion may amount to a false statement of fact if made with the intention of deceiving or misleading.⁴

Observation:

This rule recognizes that the state of any person's mind at a given moment is as much a fact as the existence of any other thing.⁵

Footnotes

- ¹ Republic Bank & Trust Co. v. Bear Stearns & Co., Inc., 683 F.3d 239 (6th Cir. 2012) (applying Kentucky law); Perez v. Alcoa Fujikura, Ltd., 969 F. Supp. 991 (W.D. Tex. 1997) (applying Texas law); Country Cove Development, Inc. v. May, 143 Idaho 595, 150 P.3d 288 (2006).
- ² Bank of America Nat. Trust & Sav. Ass'n v. Hutchinson, 212 Cal. App. 2d 142, 27 Cal. Rptr. 787 (2d Dist. 1963); Kritzer v. Moffat, 136 Wash. 410, 240 P. 355, 44 A.L.R. 681 (1925).
- ³ Leftwich v. Gaines, 134 N.C. App. 502, 521 S.E.2d 717 (1999).
- ⁴ Country Cove Development, Inc. v. May, 143 Idaho 595, 150 P.3d 288 (2006).
- ⁵ Leftwich v. Gaines, 134 N.C. App. 502, 521 S.E.2d 717 (1999).

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§ 75. Superior knowledge, or asserted superior knowledge, of person making representation

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When a speaker purports to have special knowledge of the facts¹ or does have superior knowledge of the facts,² a party may maintain a fraud action based on the speaker's statement of opinion. As it is sometimes stated, the rule is that if the person expressing the opinion possesses superior knowledge, and it is a justifiable conclusion that he or she intended untruly to imply knowledge of facts such as would justify the opinion, the opinion may be regarded in law as an assertion of fact and not honestly entertained.³ "Superior knowledge" in this context is a term of art which contemplates more than the possession by one party to a bargain of a greater acumen than is possessed by the other party; the concept is applied primarily in situations where assumed knowledge possessed by the party expressing the fraudulent opinion is a motivation to the other to enter into the transaction, or where the defendant has held him- or herself out as particularly knowledgeable.⁴

Further, where only the representor is in a position to know the information necessary to form an opinion regarding a particular matter, then those opinions may form the basis for an action for fraud.⁵

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Footnotes

¹ [GJP, Inc. v. Ghosh, 251 S.W.3d 854 \(Tex. App. Austin 2008\).](#)

² [Lui Ciro, Inc. v. Ciro, Inc., 895 F. Supp. 1365 \(D. Haw. 1995\) \(applying Hawaii law\); Baker v. United Services Auto. Ass'n, 661 So. 2d 128 \(Fla. 1st DCA 1995\); Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of America, 341 S.W.3d 323 \(Tex. 2011\).](#)

³ [Bank of America Nat. Trust & Sav. Ass'n v. Hutchinson, 212 Cal. App. 2d 142, 27 Cal. Rptr. 787 \(2d Dist. 1963\)](#)

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(superior knowledge or special information); *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966); *Forest v. Elliott Truck & Tractor Sales, Inc.*, 29 A.D.2d 1031, 289 N.Y.S.2d 431 (3d Dep't 1968), order aff'd, 23 N.Y.2d 952, 298 N.Y.S.2d 730, 246 N.E.2d 531 (1969).

⁴ *Pacesetter Homes, Inc. v. Brodtkin*, 5 Cal. App. 3d 206, 85 Cal. Rptr. 39 (2d Dist. 1970).

⁵ *Magnaleasing, Inc. v. Staten Island Mall*, 428 F. Supp. 1039, 23 Fed. R. Serv. 2d 1569 (S.D. N.Y. 1977), judgment aff'd, 563 F.2d 567 (2d Cir. 1977).

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Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 222](#) (Instruction to jury—Expressions of opinion or affirmations of fact—Statements by one having expert knowledge)

It is settled that an expression of opinion may, under many circumstances, amount to fraud where there is a relation of trust and confidence between the parties.¹ A fiduciary relationship between the parties imposes upon the one who is trusted a duty not only to state truly all matters, whether of fact or opinion,² but also to disclose all material facts.³

Observation:

Under the view of the Restatement Second, Contracts, to the extent that an assertion is one of opinion only, the recipient is not justified in relying on it unless the recipient: (1) stands in such a relation of trust and confidence to the person whose opinion is asserted that the recipient is reasonable in relying on it; or (2) reasonably believes that, as compared with himself or herself the person whose opinion is asserted has special skill, judgment or objectivity with respect to the subject matter; or (3) is for some other special reason particularly susceptible to a misrepresentation of the type involved.⁴

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Footnotes

- ¹ Vokes v. Arthur Murray, Inc., 212 So. 2d 906, 28 A.L.R.3d 1405 (Fla. 2d DCA 1968); Cheung-Loon, LLC v. Cergon, Inc., 2012 WL 1678105 (Tex. App. Dallas 2012); Tetreault v. Campbell, 115 Vt. 369, 61 A.2d 591 (1948).
- ² Armstrong v. Accrediting Council for Continuing Educ. & Training, Inc., 961 F. Supp. 305 (D.D.C. 1997); Burgdorfer v. Thielemann, 153 Or. 354, 55 P.2d 1122, 104 A.L.R. 1407 (1936); Poole v. Camden, 79 W. Va. 310, 92 S.E. 454 (1916).
- ³ § 201.
- ⁴ Restatement Second, Contracts § 169.

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An expression traditionally considered an opinion may be considered an expression of fact, thereby becoming actionable under a theory of fraudulent misrepresentation, where the relationship of the parties, the extent of reliance, and the opportunity for investigation so warrant.¹ In order to hold one liable for fraud for the expression of an opinion, the relationship between the parties need not be a formal fiduciary or confidential one in all instances, such as the relationship of trustee and cestui que trust. It is sufficient that the representor had superior knowledge,² or the representor held him- or herself out as having superior knowledge, and knew that the representee confided in the representor and was guided by the representor's opinion.³

Caution:

Unlike a fraudulent misrepresentation, the assertion of a confidential or fiduciary relationship may be mandatory when dealing with fraudulent concealment since in such a relationship, the duty to speak is clear, thus making concealment of a material fact fraudulent.⁴ Additionally, the existence of a fiduciary or confidential relationship is a mandated element of a claim for constructive fraud.⁵ Nonetheless, an exception to the general rule that a prediction or opinion is not a representation of fact on which one is entitled to rely applies where the person making the representation owes the listener a fiduciary duty.⁶

§ 77. Scope of relationship necessary to give rise to liability, 37 Am. Jur. 2d Fraud and...

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¹ [Veilleux v. National Broadcasting Co., Inc.](#), 8 F. Supp. 2d 23 (D. Me. 1998).

² [§ 76.](#)

³ [Lui Ciro, Inc. v. Ciro, Inc.](#), 895 F. Supp. 1365 (D. Haw. 1995) (applying Hawaii law); [In re Northwestern Mut. Life Ins. Co. Sales Practices Litigation](#), 70 F. Supp. 2d 466 (D.N.J. 1999), [aff'd](#), 259 F.3d 717 (3d Cir. 2001) (applying Alabama law); [Bethlahmy v. Bechtel](#), 91 Idaho 55, 415 P.2d 698 (1966).

⁴ [§ 201.](#)

⁵ [§ 25.](#)

⁶ [Armstrong v. Accrediting Council for Continuing Educ. & Training, Inc.](#), 961 F. Supp. 305 (D.D.C. 1997) (applying District of Columbia law).

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§ 78. Scope of relationship necessary to give rise to liability—Opinion of professional advisor

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Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 222](#) (Instruction to jury—Expressions of opinion or affirmations of fact—Statements by one having expert knowledge)

Under certain circumstances, expressions of professional opinion are treated as representations of fact; when a statement, although in the form of an opinion, is not a casual expression of belief but a deliberate affirmation of the matters stated, it may be regarded as a positive assertion of fact.¹

In the case of a professional advisor, liability for fraud may be imposed if the advisor expresses to another who depends upon the advisor an opinion within the scope of his or her professional capacity which the advisor knows not to be true.² Thus, liability in tort for fraud is imposed upon one who is employed to advise upon matters within the scope of his or her professional capacity and who expresses an opinion known not to be true.³ When a professional has a specific awareness that a third party will rely on his or her advice or opinion, the furnishing of which is for that very purpose, and there is reliance thereon, tort liability will ensue if the professional report or opinion is fraudulently prepared.⁴

Knowledge of the falsity of his or her opinion is not requisite, however, in order to impose liability in damages, for where the advisor's duty is to present correct statements and give sound advice, it is futile to say that there is no liability because the matter of advice would, except for the professional employment, be regarded as mere opinion.⁵ Thus, an advisor is liable where the opinion is made under such circumstances that the law must necessarily impute knowledge of its falsity to him or

her.⁶

Observation:

A representation of law is an opinion and generally cannot form the basis of an action for fraud in the absence of a fiduciary relationship.⁷

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Footnotes

- ¹ B.L.M. v. Sabo & Deitsch, 55 Cal. App. 4th 823, 64 Cal. Rptr. 2d 335 (4th Dist. 1997).
- ² Vokes v. Arthur Murray, Inc., 212 So. 2d 906, 28 A.L.R.3d 1405 (Fla. 2d DCA 1968); Squyres v. Christian, 242 S.W.2d 786 (Tex. Civ. App. Texarkana 1951), dismissed.
- ³ Lietz v. Primock, 84 Ariz. 273, 327 P.2d 288, 67 A.L.R.2d 1262 (1958) (attorney); Lane v. Inhabitants of Town of Harmony, 112 Me. 25, 90 A. 546 (1914) (architect); Tvedt v. Haugen, 70 N.D. 338, 294 N.W. 183, 132 A.L.R. 379 (1940) (physician).
- ⁴ Rodin Properties-Shore Mall, N.V. v. Ullman, 264 A.D.2d 367, 694 N.Y.S.2d 374 (1st Dep't 1999).
- ⁵ Tvedt v. Haugen, 70 N.D. 338, 294 N.W. 183, 132 A.L.R. 379 (1940) (physician).
- ⁶ Collins v. Chipman, 41 Tex. Civ. App. 563, 95 S.W. 666 (1906), writ refused; Squyres v. Christian, 242 S.W.2d 786 (Tex. Civ. App. Texarkana 1951), dismissed.
- ⁷ § 101.

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Trial Strategy

[Liability of Product Endorser for Personal Injury Caused by Defective Product, 29 Am. Jur. Proof of Facts 149](#)

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 221](#) (Instruction to jury—Commendatory trade talk as mere expressions of opinion)

It is a broad generalization that commendatory language is not construed as importing a representation upon which a charge of fraud may be based.¹ Applying this principle to the factual business transaction in which the question most often arises, the rule is well settled that mere general commendations of property sought to be sold,² commonly known as “sales talk,”³ “trade talk,”⁴ “dealer’s talk,”⁵ “seller’s statements,”⁶ “sales propaganda,”⁷ “promotion,”⁸ or “puffing” or “puffery,”⁹ do not amount to actionable misrepresentations where the parties deal at arm’s length¹⁰ and have equal means of information and are equally qualified to judge the value of the property sold.¹¹ To such statements, the maxim of “caveat emptor” applies.¹²

Observation:

In determining whether a statement is puffery for negligent misrepresentation purposes, the context matters; the relative expertise of the speaker and the listener can be a critical factor, along with the size of the audience.¹³

CUMULATIVE SUPPLEMENT

Cases:

Statements made in manufacturer's advertisements for diesel engine vehicle, regarding the "high-quality" and "safety" of its vehicles, the vehicle's "clean diesel" engine, and the vehicle's "more efficient combustion" and improved "performance," and stating that the vehicle's engine generated "at least 90% less nitrogen oxide and particulate emissions when compared to previous-generation diesels," constituted non-actionable puffery and, thus, did not support fraud claim. [Counts v. General Motors, LLC, 237 F. Supp. 3d 572 \(E.D. Mich. 2017\)](#).

Marketing statements by company that sold memberships in personalized healthcare program, that program would provide "exceptional" doctors, care, and results, and that affiliated doctors were "finest national specialists" and a "fraternity of some of the nation's finest physicians," were mere puffery and not actionable as fraudulent misrepresentations or misleading advertising by member who was allegedly injured due to medical malpractice by program physician; status of being the "finest" or the "best" was a matter of opinion, and statements describing what made an "exceptional doctor" were statements of opinion concerning such things as credentials and reputation. [Fla. Stat. Ann. § 817.40\(5\). MDVIP, Inc. v. Beber, 222 So. 3d 555 \(Fla. 4th DCA 2017\)](#).

While determining whether a statement is puffery for purposes of a fraudulent representation claim is usually a question of fact it can at times be a question of law, and courts should apply the usual summary judgment standard to figure out which label fits more closely in a given case. [W.S.A. 100.18. United Concrete & Const., Inc. v. Red-D-Mix Concrete, Inc., 2013 WI 72, 836 N.W.2d 807 \(Wis. 2013\)](#).

[END OF SUPPLEMENT]

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Footnotes

- ¹ [Lefebvre Intergraphics, Inc. v. Sanden Mach. Ltd., 946 F. Supp. 1358, 34 U.C.C. Rep. Serv. 2d 385 \(N.D. Ill. 1996\) \(applying Illinois law\); Constance v. B.B.C. Development Co., 25 S.W.3d 571 \(Mo. Ct. App. W.D. 2000\); Reich v. Mitrani Plasterers Co., Inc., 268 A.D.2d 256, 701 N.Y.S.2d 368 \(1st Dep't 2000\); Tate v. Colony House Builders, Inc., 257 Va. 78, 508 S.E.2d 597 \(1999\).](#)
As to remedies of buyers for seller's fraud as breach of a warranty, see [Am. Jur. 2d, Sales §§ 1075 to 1084](#).
- ² [Atlantic Nat. Bank of Boston v. Korrick, 29 Ariz. 468, 242 P. 1009, 43 A.L.R. 1184 \(1926\); Thomas v. Mississippi Val. Gas Co., 237 Miss. 100, 113 So. 2d 535 \(1959\); Castleman v. Stryker, 107 Or. 48, 213 P. 436 \(1923\).](#)
- ³ [Republic Bank & Trust Co. v. Bear Stearns & Co., Inc., 683 F.3d 239 \(6th Cir. 2012\) \(applying Kentucky law\); Russell v. Wilson, 991 So. 2d 745 \(Ala. Civ. App. 2008\).](#)
- ⁴ [Atlantic Nat. Bank of Boston v. Korrick, 29 Ariz. 468, 242 P. 1009, 43 A.L.R. 1184 \(1926\); Herrill v. Rugg, 114 Cal. App. 492, 300 P. 140 \(1st Dist. 1931\); Tate v. Colony House Builders, Inc., 257 Va. 78, 508 S.E.2d 597 \(1999\).](#)

- ⁵ Presidio Enterprises, Inc. v. Warner Bros. Distributing Corp., 784 F.2d 674 (5th Cir. 1986); King v. Codisco, Inc., 217 Ga. App. 704, 458 S.E.2d 881 (1995); Dyer v. Caldcleugh and Powers, 392 S.W.2d 523 (Tex. Civ. App. Corpus Christi 1965), writ refused n.r.e., (Jan. 26, 1966).
- ⁶ Sorrells v. Clifford, 23 Ariz. 448, 204 P. 1013 (1922); Castleman v. Stryker, 107 Or. 48, 213 P. 436 (1923); Patterson v. Bushong, 196 S.W. 962 (Tex. Civ. App. Fort Worth 1917), writ refused, (June 5, 1918).
- ⁷ Constance v. B.B.C. Development Co., 25 S.W.3d 571 (Mo. Ct. App. W.D. 2000).
- ⁸ Trans-Spec Truck Service, Inc. v. Caterpillar Inc., 524 F.3d 315, 70 Fed. R. Serv. 3d 568, 65 U.C.C. Rep. Serv. 2d 633 (1st Cir. 2008) (applying Massachusetts law).
- ⁹ Republic Bank & Trust Co. v. Bear Stearns & Co., Inc., 683 F.3d 239 (6th Cir. 2012) (applying Kentucky law); Shroyer v. New Cingular Wireless Services, Inc., 622 F.3d 1035 (9th Cir. 2010) (applying California law); Russell v. Wilson, 991 So. 2d 745 (Ala. Civ. App. 2008); Hanson-Suminski v. Rohrman Midwest Motors, Inc., 386 Ill. App. 3d 585, 325 Ill. Dec. 461, 898 N.E.2d 194 (1st Dist. 2008); Flegles, Inc. v. TruServ Corp., 289 S.W.3d 544 (Ky. 2009); Harrison v. Avalon Properties, LLC, 246 S.W.3d 587 (Tenn. Ct. App. 2007).
- ¹⁰ Republic Bank & Trust Co. v. Bear Stearns & Co., Inc., 683 F.3d 239 (6th Cir. 2012) (applying Kentucky law); Morris v. Budd, 226 Ga. App. 455, 486 S.E.2d 682 (1997); Hodson v. Wells & Dickey Co., 31 N.D. 395, 154 N.W. 193 (1915); Castleman v. Stryker, 107 Or. 48, 213 P. 436 (1923); Stewart v. Larkin, 74 Wash. 681, 134 P. 186 (1913).
- ¹¹ Republic Bank & Trust Co. v. Bear Stearns & Co., Inc., 683 F.3d 239 (6th Cir. 2012) (applying Kentucky law); Sorrells v. Clifford, 23 Ariz. 448, 204 P. 1013 (1922); Landis v. Rodgers, 1926 OK 735, 119 Okla. 233, 249 P. 398 (1926); Tate v. Colony House Builders, Inc., 257 Va. 78, 508 S.E.2d 597 (1999).
- ¹² Thomas v. Mississippi Val. Gas Co., 237 Miss. 100, 113 So. 2d 535 (1959); Molloy v. Brown, 364 Pa. 92, 70 A.2d 336 (1950).
As to the effect of fraud, generally, on “caveat emptor,” see § 81.
- ¹³ Alpine Bank v. Hubbell, 555 F.3d 1097 (10th Cir. 2009).

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IV. False Representations

B. Necessity that Representation Be of Fact; Opinions

4. Commendatory Trade Talk; Promotion and “Puffery”

§ 80. Rationale underlying rule

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The rule deeming trade talk not to be tantamount to representation is based on the universal practice of the seller to recommend the article or thing offered for sale and to employ more or less extravagant language in connection therewith.¹ Exaggerated statements as to value, quality, etc., do no more than express the opinion of the speaker,² and the law does not impose strict accountability for those vague commendations of a seller’s wares that are manifestly open to differences of opinion and that do not imply untrue assertions concerning matters of direct observation,³ being rather in the nature of exaggerations and meaningless superlatives, the truth or falsity of which cannot be precisely determined.⁴ The buyer cannot have relied on such commendations⁵ and has no right to do so.⁶

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Footnotes

¹ [Sorrells v. Clifford](#), 23 Ariz. 448, 204 P. 1013 (1922); [Castleman v. Stryker](#), 107 Or. 48, 213 P. 436 (1923); [Patterson v. Bushong](#), 196 S.W. 962 (Tex. Civ. App. Fort Worth 1917), writ refused, (June 5, 1918). Sales talk or puffing is a universal and an expected practice and does not amount to actionable misrepresentation. [Republic Bank & Trust Co. v. Bear Stearns & Co., Inc.](#), 683 F.3d 239 (6th Cir. 2012) (applying Kentucky law).

² [Russell v. Wilson](#), 991 So. 2d 745 (Ala. Civ. App. 2008); [Home Depot U.S.A., Inc. v. Wabash Nat. Corp.](#), 314 Ga. App. 360, 724 S.E.2d 53 (2012); [Miller v. J and Q Automotive, Inc.](#), 2010 Mass. App. Div. 41, 2010 WL 1139244 (2010); [Harrison v. Avalon Properties, LLC](#), 246 S.W.3d 587 (Tenn. Ct. App. 2007).

³ [Hogan v. McCombs Bros.](#), 190 Iowa 650, 180 N.W. 770 (1921); [Castleman v. Stryker](#), 107 Or. 48, 213 P. 436 (1923); [Patterson v. Bushong](#), 196 S.W. 962 (Tex. Civ. App. Fort Worth 1917), writ refused, (June 5, 1918).

⁴ [Hanson-Suminski v. Rohrman Midwest Motors, Inc.](#), 386 Ill. App. 3d 585, 325 Ill. Dec. 461, 898 N.E.2d 194 (1st Dist.

2008).

⁵ [Speakers of Sport, Inc. v. ProServ, Inc.](#), 178 F.3d 862 (7th Cir. 1999); [Atlantic Nat. Bank of Boston v. Korrick](#), 29 Ariz. 468, 242 P. 1009, 43 A.L.R. 1184 (1926); [Morris v. Budd](#), 226 Ga. App. 455, 486 S.E.2d 682 (1997).

For negligent misrepresentation purposes, the term “puffery” is used to characterize those vague generalities that no reasonable person would rely on as assertions of particular facts. [Alpine Bank v. Hubbell](#), 555 F.3d 1097 (10th Cir. 2009) (applying Colorado law).

⁶ § 252.

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37 Am. Jur. 2d Fraud and Deceit § 81

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IV. False Representations

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4. Commendatory Trade Talk; Promotion and “Puffery”

§ 81. Exceptions to rule of nonliability; distinction between deceptive representation and “puffing”

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A.L.R. Library

Computer sales and leases: breach of warranty, misrepresentation, or failure of consideration as defense or ground for affirmative relief, 37 A.L.R.4th 110

Trial Strategy

Misrepresentation in Automobile Sales, 13 Am. Jur. Trials 253

The doctrine of nonresponsibility for mere trade talk has no application to false representations of material facts that are in their nature calculated to deceive and are made with the intent to deceive,¹ particularly where the parties do not stand on an equal footing or have equal means of knowing the truth,² or to representations of value that are made to induce an ignorant person to enter into a contract and upon which he or she relies, to his or her detriment.³ Otherwise stated, the decisive test to determine whether a seller’s statements are mere inactionable puffing is whether the seller asserts a fact of which the buyer is ignorant or merely states an opinion or judgment on a matter of which the seller has no special knowledge and on which the buyer may be expected also to have an opinion and to exercise his or her judgment.⁴

In a plain case of cheating, swindling, or gross duplicity, the rule of caveat emptor should have no application.⁵ Furthermore, it may be safely said that the tendency is to hold a merchant to a fairly strict accountability for representations made in connection with the sale of goods.⁶

CUMULATIVE SUPPLEMENT

Cases:

On charge of false advertising and consumer confusion under Lanham Act, competitor's claim of "lasting" performance with regard to large tote towel was not non-actionable "blustering" or "boasting," and did not sound like non-actionable "puffery," since it had been stated as fact. Lanham Act, § 43(a), 15 U.S.C.A. § 1125(a). *Hall v. Bed Bath & Beyond, Inc.*, 705 F.3d 1357 (Fed. Cir. 2013).

Statements on prefabricated steel building distributor's website, that it had "zero unresolved customer issues" and "a history of 100% customer satisfaction" were not mere puffery, and thus were actionable as false advertising, as they were specific, measurable claims that could be evaluated as true or false. *General Steel Domestic Sales, LLC v. Chumley*, 129 F. Supp. 3d 1158 (D. Colo. 2015).

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Footnotes

- ¹ *Harris v. Rosenberger*, 145 F. 449 (C.C.A. 8th Cir. 1906); *Weitzel v. Jukich*, 73 Idaho 301, 251 P.2d 542 (1952); *Hogan v. McCombs Bros.*, 190 Iowa 650, 180 N.W. 770 (1921).
- ² *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966); *Weitzel v. Jukich*, 73 Idaho 301, 251 P.2d 542 (1952).
- ³ *Landis v. Rodgers*, 1926 OK 735, 119 Okla. 233, 249 P. 398 (1926).
- ⁴ *Helena Chemical Co. v. Wilkins*, 18 S.W.3d 744 (Tex. App. San Antonio 2000), judgment aff'd, 47 S.W.3d 486 (Tex. 2001).
- ⁵ *Fourth Nat. Bank v. Webb*, 131 Kan. 167, 290 P. 1, 71 A.L.R. 619 (1930).
- ⁶ *Hogan v. McCombs Bros.*, 190 Iowa 650, 180 N.W. 770 (1921); *Bell v. Bradshaw*, 342 S.W.2d 185 (Tex. Civ. App. Dallas 1960).

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§ 82. Applications of rule and exceptions

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Some of the statements to which the general rule of nonresponsibility for commendatory language has been applied are:

- “best price” claims¹
- representations as to the advantages of a purchase²
- statements as to the status of a particular product in comparison with competitor’s products, or as an innovation in the industry³
- a statement that consumers will receive “all the advantages that only the nation’s largest wireless company can provide”⁴
- statements regarding computer software or hardware to the effect that the use of the product will improve business operations or profitability⁵ or keep the consumer “up to date”⁶
- statements that the product is of the “highest quality”⁷ or is “mechanically fine,” “mechanically sound,” and in “good shape”⁸
- statements by a broker’s agent as to the advantages of consigning merchandise to the broker for sale⁹
- representations made by the seller of a business or agency to the buyer concerning the agency’s goodwill and good customer relations¹⁰

Observation:

Purported misrepresentations that are conclusory may be deemed to constitute mere puffery where they are contradicted by the written agreement between the parties.¹¹

Footnotes

- ¹ Flegles, Inc. v. TruServ Corp., 289 S.W.3d 544 (Ky. 2009).
- ² Midwest Printing, Inc. v. AM Intern., Inc., 108 F.3d 168, 32 U.C.C. Rep. Serv. 2d 134 (8th Cir. 1997) (applying Missouri law); Griffin v. H. L. Peterson Co., 427 S.W.2d 140 (Tex. Civ. App. Dallas 1968).
- ³ All-Tech Telecom, Inc. v. Amway Corp., 174 F.3d 862, 38 U.C.C. Rep. Serv. 2d 88 (7th Cir. 1999) (statement that product was “the best”); Midwest Printing, Inc. v. AM Intern., Inc., 108 F.3d 168, 32 U.C.C. Rep. Serv. 2d 134 (8th Cir. 1997) (applying Missouri law); Huddleston v. Infertility Center of America, Inc., 700 A.2d 453 (Pa. Super. Ct. 1997).
- ⁴ Shroyer v. New Cingular Wireless Services, Inc., 622 F.3d 1035 (9th Cir. 2010).
- ⁵ Scheduled Airlines Traffic Offices, Inc. v. Objective Inc., 180 F.3d 583 (4th Cir. 1999) (applying Virginia law).
- ⁶ Peerless Wall and Window Coverings, Inc. v. Synchronics, Inc., 85 F. Supp. 2d 519, 41 U.C.C. Rep. Serv. 2d 462 (W.D. Pa. 2000), order aff’d, 234 F.3d 1265 (3d Cir. 2000).
- ⁷ Serbalik v. General Motors Corp., 246 A.D.2d 724, 667 N.Y.S.2d 503 (3d Dep’t 1998); Tate v. Colony House Builders, Inc., 257 Va. 78, 508 S.E.2d 597 (1999).
A motion picture distributor’s representations to a film exhibitor concerning the quality of a film it was scheduled to release are merely dealers’ talk or puffery. Presidio Enterprises, Inc. v. Warner Bros. Distributing Corp., 784 F.2d 674 (5th Cir. 1986).
- ⁸ Russell v. Wilson, 991 So. 2d 745 (Ala. Civ. App. 2008).
- ⁹ Atlantic Nat. Bank of Boston v. Korrick, 29 Ariz. 468, 242 P. 1009, 43 A.L.R. 1184 (1926).
- ¹⁰ Dyer v. Caldcleugh and Powers, 392 S.W.2d 523 (Tex. Civ. App. Corpus Christi 1965), writ refused n.r.e., (Jan. 26, 1966).
- ¹¹ Sheth v. New York Life Ins. Co., 273 A.D.2d 72, 709 N.Y.S.2d 74 (1st Dep’t 2000).

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§ 83. Applications of rule and exceptions—Statements in advertisements, catalogs, circulars, etc

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[Products Liability: Statements in Advertisements as Affecting Liability of Manufacturers or Sellers for Injury Caused by Product Other than Tobacco, 93 A.L.R.5th 103](#)

[Actionable nature of advertising impugning quality or worth of merchandise or products, 42 A.L.R.4th 318 \(secs. 3-9 superseded in part by Defamation of Manufacturer, Regarding Product, Other than Through Statement Charging Breach or Nonperformance of Contract, 104 A.L.R.5th 523\)](#)

[What constitutes “false advertising” of food products or cosmetics within secs. 5 and 12 of the Federal Trade Commission Act \(15 U.S.C.A. secs. 45, 52\), 50 A.L.R. Fed. 16](#)

Trial Strategy

[Liability for Airing False or Misleading Television Infomercials, 37 Am. Jur. Proof of Facts 3d 259](#)

[Sports Memorabilia Dealer's Liability to Collector, 33 Am. Jur. Proof of Facts 3d 359](#)

Statements or claims in newspaper advertisements, catalogs, circulars, etc., by a seller, may give rise to actions for fraud or misrepresentation.¹ An advertisement may be fraudulent although every sentence in it, separately considered, is literally true,

if things are omitted that should have been said, or if it is composed or purposefully printed in such a way as to mislead.² That exceptionally acute and sophisticated readers may be able by penetrating analysis to decipher the true nature of an advertisement does not necessarily mean that the advertisement is not fraudulent, but rather, the question of fraud should be determined in the light of the effect the advertisement would most probably produce on ordinary minds.³ However, the rule by which the seller of goods is bound for false representations as to the nature thereof, contained in circulars or advertisements displayed to the public at and prior to the time of sale, which may be presumed to have become a part of the inducement of the contract, is limited to representations of fact and does not include mere statements of opinion as to the nature or quality of the property.⁴ Representations or statements made in advertisements or circulars by one having goods to sell, as to their quality or worth, may be mere nonactionable “dealer’s talk” or “puffing,”⁵ and the same possibility applies with respects to statements in a company’s press release.⁶

The rule requiring reliance upon a misrepresentation in order to recover for fraud⁷ is fully applicable where a seller’s representations appear in an advertisement.⁸

CUMULATIVE SUPPLEMENT

Cases:

Automobile manufacturer’s representation in advertising materials that its trucks met federal nitrogen oxide emissions standards was not mere puffery, since emissions standards were quantifiable and specific, and thus such representation, if false, could support buyers’ civil claims under Racketeer Influenced and Corrupt Organizations Act. 18 U.S.C.A. § 1962. *Bledsoe v. FCA US LLC*, 378 F. Supp. 3d 626 (E.D. Mich. 2019).

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Footnotes

¹ *Economy Hog & Cattle Powder Co. v. Compton*, 192 Ind. 222, 135 N.E. 1 (1922); *Chesus v. Watts*, 967 S.W.2d 97 (Mo. Ct. App. W.D. 1998); *Stad v. Grace Downs Model and Air Career School*, 65 Misc. 2d 1095, 319 N.Y.S.2d 918 (N.Y. Civ. Ct. 1971).

² *Donaldson v. Read Magazine*, 333 U.S. 178, 68 S. Ct. 591, 92 L. Ed. 628 (1948).

³ *Donaldson v. Read Magazine*, 333 U.S. 178, 68 S. Ct. 591, 92 L. Ed. 628 (1948).

⁴ *Alpine v. Friend Bros.*, 244 Mass. 164, 138 N.E. 553 (1923); *Ralston Purina Co. v. Iiams*, 143 Neb. 588, 10 N.W.2d 452 (1943).

⁵ *Glen Holly Entertainment, Inc. v. Tektronix, Inc.*, 100 F. Supp. 2d 1086 (C.D. Cal. 1999) (rejected on other grounds by, *Petersen v. Allstate Indem. Co.*, 281 F.R.D. 413 (C.D. Cal. 2012)) (applying California law); *Minnesota Forest Products, Inc. v. Ligna Machinery, Inc.*, 17 F. Supp. 2d 892, 37 U.C.C. Rep. Serv. 2d 273 (D. Minn. 1998); *Dobbin v. Pacific Coast Coal Co.*, 25 Wash. 2d 190, 170 P.2d 642 (1946).

⁶ *Shroyer v. New Cingular Wireless Services, Inc.*, 622 F.3d 1035 (9th Cir. 2010).

⁷ § 231.

⁸ *Rachlin v. Libby-Owens-Ford Glass Co.*, 96 F.2d 597 (C.C.A. 2d Cir. 1938); *Dobbin v. Pacific Coast Coal Co.*, 25 Wash. 2d 190, 170 P.2d 642 (1946).

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C. Matters of Futurity; Promises and Statements of Intention

1. In General; Statements as to Events in Future

§ 84. General rule against liability

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[Employer's misrepresentations as to employee's or agent's future earnings as actionable fraud, 16 A.L.R.3d 1311](#)

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 214](#) (Instruction to jury—Representation regarding future act or promise not fraudulent—Exception for present intent not to perform)

Generally, fraud must relate to a present or preexisting fact,¹ and, although they may give rise to an action for breach of contract,² mere unfulfilled promises to do a particular thing in the future do not constitute fraud in and of themselves.³ Similarly, mere predictions,⁴ projections,⁵ or expressions of opinion about what will occur in the future,⁶ including results to be anticipated in the future from known and recognized conditions,⁷ do not constitute fraud even though they turn out to be false, at least where they are not made with intent to deceive, and where the parties have equal means of knowledge,⁸ or the subject is equally open to the investigation of both,⁹ and an examination has not been fraudulently prevented.¹⁰ Such statements are generally regarded as mere expressions of opinion,¹¹ or mere promises or conjectures,¹² or trade talk or puffing,¹³ which must have been understood by the other party to be such¹⁴ and on which the other party has no right to rely.¹⁵ As one court has observed, mere optimism, even excessive optimism, is not actionable in fraud.¹⁶

CUMULATIVE SUPPLEMENT

Cases:

Under Maryland law, alleged statements by employee of company that prepared and administered standardized college admission test advising test taker and his father, upon company's canceling test score, that the option of providing documentation to individual score review panel was the best approach and that company would very likely preserve test taker's score, were merely estimates or opinions and thus could not be basis for fraud. [Cherdak v. ACT, Inc., 437 F. Supp. 3d 442 \(D. Md. 2020\)](#).

Opinions and predictions cannot form the basis of a fraud claim because they do not speak to matters of fact; thus, a representation consisting of promise or a statement as to a future event will not serve as basis for fraud, even though it was made under circumstances as to knowledge and belief which would give rise to an action for fraud had it related to an existing or past fact. [April Beguesse, Inc. v. Rammell, 328 P.3d 480 \(Idaho 2014\)](#).

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Footnotes

¹ § 63.

² [Merrill Lynch & Co. Inc. v. Allegheny Energy, Inc., 500 F.3d 171 \(2d Cir. 2007\) \(applying New York law\)](#).

³ § 87.

⁴ [Sindecuse v. Katsaros, 541 F.3d 801 \(8th Cir. 2008\) \(applying Missouri law\)](#); [Onusko v. JP Morgan Chase Bank, NA, 824 F. Supp. 2d 635 \(D. Md. 2011\) \(applying Maryland law\)](#); [General Retirement System of City of Detroit v. UBS, AG, 799 F. Supp. 2d 749 \(E.D. Mich. 2011\) \(applying New York law\)](#); [Ussery v. Children's Healthcare of Atlanta, Inc., 289 Ga. App. 255, 656 S.E.2d 882 \(2008\)](#); [Country Cove Development, Inc. v. May, 143 Idaho 595, 150 P.3d 288 \(2006\)](#).

⁵ [Grove v. Principal Mut. Life Ins. Co., 14 F. Supp. 2d 1101 \(S.D. Iowa 1998\) \(applying Iowa law\)](#); [Illinois Non-Profit Risk Management Ass'n v. Human Service Center of Southern Metro-East, 378 Ill. App. 3d 713, 318 Ill. Dec. 732, 884 N.E.2d 700 \(4th Dist. 2008\)](#).

⁶ [Koch v. Koch Industries, Inc., 969 F. Supp. 1460 \(D. Kan. 1997\)](#), *aff'd in part, rev'd in part on other grounds*, 203 F.3d 1202, 53 Fed. R. Evid. Serv. 663, 46 Fed. R. Serv. 3d 204 (10th Cir. 2000) (applying Kansas law); [Pacesetter Motors, Inc. v. Nissan Motor Corp. in U.S.A., 913 F. Supp. 174 \(W.D. N.Y. 1996\) \(applying New York law\)](#); [Gontrum v. Mayor and City Council of Baltimore, 182 Md. 370, 35 A.2d 128 \(1943\)](#).

⁷ [Herman v. Mutual Life Ins. Co. of New York, 108 F.2d 678, 127 A.L.R. 1458 \(C.C.A. 3d Cir. 1939\)](#); [Wade v. Chase Manhattan Mortg. Corp., 994 F. Supp. 1369 \(N.D. Ala. 1997\)](#), *aff'd*, 132 F.3d 1461 (11th Cir. 1997) (applying Alabama law); [Lescher v. Baird, 173 Ark. 1033, 294 S.W. 17 \(1927\)](#).

⁸ [Lescher v. Baird, 173 Ark. 1033, 294 S.W. 17 \(1927\)](#); [Gontrum v. Mayor and City Council of Baltimore, 182 Md. 370, 35 A.2d 128 \(1943\)](#); [Kennedy v. Flo-Tronics, Inc., 274 Minn. 327, 143 N.W.2d 827 \(1966\)](#).

⁹ [Bell v. Southern Home Bldg. & Loan Ass'n, 140 Ala. 371, 37 So. 237 \(1904\)](#); [Lescher v. Baird, 173 Ark. 1033, 294 S.W. 17 \(1927\)](#); [Halpern v. Cafarelli, 98 N.J.L. 77, 118 A. 684 \(N.J. Sup. Ct. 1922\)](#).

- ¹⁰ Lescher v. Baird, 173 Ark. 1033, 294 S.W. 17 (1927).
- ¹¹ Glen Holly Entertainment, Inc. v. Tektronix, Inc., 100 F. Supp. 2d 1086 (C.D. Cal. 1999) (rejected on other grounds by, Petersen v. Allstate Indem. Co., 281 F.R.D. 413 (C.D. Cal. 2012)) (applying California law); McCutchen Co., Inc. v. Media General, Inc., 988 So. 2d 998 (Ala. 2008); Jobe v. Akowchek, 259 A.D.2d 735, 687 N.Y.S.2d 417 (2d Dep't 1999).
- ¹² Millen Industries, Inc. v. Flexo-Accessories Co., Inc., 5 F. Supp. 2d 72 (D. Mass. 1998) (applying Massachusetts law); General Retirement System of City of Detroit v. UBS, AG, 799 F. Supp. 2d 749 (E.D. Mich. 2011) (applying New York law); Griffin v. State Bank of Cochran, 312 Ga. App. 87, 718 S.E.2d 35 (2011).
- ¹³ Flegles, Inc. v. TruServ Corp., 289 S.W.3d 544 (Ky. 2009).
Trade talk or puffing, generally, see §§ 79 to 83.
- ¹⁴ Engemann v. Allen, 201 Ky. 483, 257 S.W. 25 (1923); Halpern v. Cafarelli, 98 N.J.L. 77, 118 A. 684 (N.J. Sup. Ct. 1922); O'Dell v. Appalachian Hotel Corporation, 153 Va. 283, 149 S.E. 487, 68 A.L.R. 629 (1929); Bushnell v. Elkins, 34 Wyo. 495, 245 P. 304, 51 A.L.R. 13 (1926).
- ¹⁵ § 252.
- ¹⁶ Flegles, Inc. v. TruServ Corp., 289 S.W.3d 544 (Ky. 2009).

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Fraud and Deceit

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IV. False Representations

C. Matters of Futurity; Promises and Statements of Intention

1. In General; Statements as to Events in Future

§ 85. General rule against liability—Illustrative applications

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[False representations as to income, profits, or productivity of property as fraud, 27 A.L.R.2d 14](#)

The general rule that statements about the future which turn out to be false do not give rise to liability for fraud¹ generally applies in sales of real² or personal³ property and in trades or exchanges.⁴ Illustrations of the rule are found in decisions holding that fraud cannot be based upon representations concerning the future value, profitability,⁵ or prospects⁶ of a business, such as representations of future insolvency;⁷ representations of the capacity of a corporation to produce product in the future;⁸ or representations as to future prospects of gain,⁹ such as a prediction that corporate stock will triple in value within a year¹⁰ or six months;¹¹ or predictions as to how mining claims will turn out in the matter of yield.¹² It has been said in this regard that forward-looking opinions about investment prospects or future sales performance generally cannot be the basis for a fraud claim.¹³ Also within the class of representations of futurity that will not result in liability are:

- assurances of the outcome or result of litigation¹⁴
- statements or representations that a series of law books, to be published at stated intervals, will be continued so long as another publishing company continues to publish certain of its books¹⁵
- representations that it will take a certain time for a sales agency to “clean up” its present orders¹⁶
- an assurance by an owner of a tract of land, when selling lots thereon restricted to residential purposes, that the whole tract will be so restricted¹⁷

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Footnotes

1 §§ 84, 85.

2 Ayers v. Southern Pac. R. Co., 173 Cal. 74, 159 P. 144 (1916); Jobe v. Akowchek, 259 A.D.2d 735, 687 N.Y.S.2d 417
(2d Dep't 1999).

3 Kennedy v. Flo-Tronics, Inc., 274 Minn. 327, 143 N.W.2d 827 (1966) (corporate stock); American Law Book Co. v.
Fulwiler, 219 S.W. 881 (Tex. Civ. App. El Paso 1920).

4 Nelson v. Van Schaack & Co., 87 Colo. 199, 286 P. 865 (1930); Brinkley v. Arnold, 98 Fla. 166, 123 So. 569 (1929).

5 Boulden v. Stilwell, 100 Md. 543, 60 A. 609 (1905); Haney v. Parkison, 72 Or. 249, 143 P. 926 (1914); Patterson v.
Bushong, 196 S.W. 962 (Tex. Civ. App. Fort Worth 1917), writ refused, (June 5, 1918).
As to statements credit, solvency, and financial standing, generally, see §§ 184 to 193.

6 McCormick v. Jackson, 209 N.C. 359, 183 S.E. 369 (1936); Patterson v. Bushong, 196 S.W. 962 (Tex. Civ. App. Fort
Worth 1917), writ refused, (June 5, 1918); Bushnell v. Elkins, 34 Wyo. 495, 245 P. 304, 51 A.L.R. 13 (1926).

7 Boulden v. Stilwell, 100 Md. 543, 60 A. 609 (1905); Patterson v. Bushong, 196 S.W. 962 (Tex. Civ. App. Fort Worth
1917), writ refused, (June 5, 1918).
As to statements regarding credit, solvency, and financial standing, generally, see §§ 184 to 193.

8 Evans v. Gray, 215 So. 2d 40 (Fla. 3d DCA 1968).

9 Williamson v. Holt, 147 N.C. 515, 61 S.E. 384 (1908); Patterson v. Bushong, 196 S.W. 962 (Tex. Civ. App. Fort
Worth 1917), writ refused, (June 5, 1918).

10 Kennedy v. Flo-Tronics, Inc., 274 Minn. 327, 143 N.W.2d 827 (1966).

11 Sparks v. State, 256 So. 2d 537 (Fla. 4th DCA 1972), writ discharged, 273 So. 2d 74 (Fla. 1973).

12 Burwash v. Ballou, 230 Ill. 34, 82 N.E. 355 (1907).

13 Flegles, Inc. v. TruServ Corp., 289 S.W.3d 544 (Ky. 2009).

14 Bailey v. Diamond Intern. Corp., 47 A.D.2d 363, 367 N.Y.S.2d 107 (3d Dep't 1975).

15 Bigelow v. Barnes, 121 Minn. 148, 140 N.W. 1032 (1913).

16 Lowther v. Hays, 225 S.W.2d 708 (Mo. 1950).

17 Sprague v. Kimball, 213 Mass. 380, 100 N.E. 622 (1913).

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IV. False Representations

C. Matters of Futurity; Promises and Statements of Intention

1. In General; Statements as to Events in Future

§ 86. Exceptions and qualifications, generally

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If the person making the statement as to a future event is guilty of an actual fraudulent intent, and makes the misrepresentation with the intention of deceiving and defrauding the other party and accomplishes this result to the latter's injury, fraud may, under many circumstances, be predicated thereon, notwithstanding the future nature of the representation. This conclusion is reached frequently on the theory that a person's intention or belief is a matter of fact and that, therefore, if a misrepresentation is made with regard to the same, the misrepresentation is one of fact.¹ Where a person fraudulently and positively, as with personal knowledge, states that something is to be done or is to occur when he or she knows that it is not to be done or to occur, the statement will support an action in fraud. This is not a case of prophecy or predication of something that it is merely hoped or expected will occur in the future but a specific affirmation of an arrangement under which something is to occur where the party making the affirmation knows perfectly well that no such thing is to occur; such statements and representations, when false, are actionable.² False representations as to future events will constitute fraud where these events depend upon the acts of the party making the representations and form the inducement whereby the other party is led into the transaction,³ or most often where the future event is within the control of the person making the representation,⁴ or where the speaker knows that the hearer understands the speaker to mean that facts within the speaker's knowledge warrant the expectations being raised,⁵ or where one knows that the other party is guided by his or her statements.⁶

A representation regarding future conduct can, in some situations, give rise to constructive fraud.⁷

CUMULATIVE SUPPLEMENT

Cases:

Under Kentucky law, statement as to future conduct may form basis for misrepresentation claim if made with intent to induce

other party to enter into contract. *C.A.F. & Associates, LLC v. Portage, Inc.*, 913 F. Supp. 2d 333 (W.D. Ky. 2012).

[END OF SUPPLEMENT]

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Footnotes

- ¹ *Polusky v. Allstate Petroleum, Inc.*, 180 So. 2d 815 (La. Ct. App. 4th Cir. 1965); *Thieman v. Thieman*, 218 S.W.2d 580 (Mo. 1949); *City of Houston v. Howe & Wise*, 373 S.W.2d 781 (Tex. Civ. App. Houston 1963), writ refused n.r.e., (Apr. 22, 1964); *Weir v. School Dist. No. 201, Klickitat County*, 200 Wash. 172, 93 P.2d 308, 123 A.L.R. 1057 (1939).
- ² *Outlook Windows Partnership v. York Intern. Corp.*, 112 F. Supp. 2d 877, 43 U.C.C. Rep. Serv. 2d 546 (D. Neb. 2000) (applying Nebraska law).
Representations that property bought for a warehouse would not be flooded in the future have been held to support a charge of fraud where the possibility of flooding existed, and the representor was apparently aware of it. *People's Furniture & Appliance Co. v. Healy*, 365 Mich. 522, 113 N.W.2d 802 (1962).
- ³ *Elastic Paint & Mfg. Co. v. Johnson*, 127 Or. 647, 271 P. 996 (1928); *Tunkle v. Padgett*, 160 S.C. 274, 158 S.E. 693 (1931); *Palmetto Bank & Trust Co. v. Grimsley*, 134 S.C. 493, 133 S.E. 437, 51 A.L.R. 42 (1926).
Liability based on promises and statements of intention, generally, see §§ 87 to 100.
- ⁴ *Outlook Windows Partnership v. York Intern. Corp.*, 112 F. Supp. 2d 877, 43 U.C.C. Rep. Serv. 2d 546 (D. Neb. 2000) (applying Nebraska law); *Ryann Spencer Group, Inc. v. Assurance Co. of America*, 275 S.W.3d 284 (Mo. Ct. App. E.D. 2008).
- ⁵ *Davis v. Louisville Trust Co.*, 181 F. 10 (C.C.A. 6th Cir. 1910); *Freggens v. Clark*, 100 N.J. Eq. 389, 135 A. 681 (Ch. 1927); *Russell v. Industrial Transp. Co.*, 113 Tex. 441, 251 S.W. 1034, 51 A.L.R. 1 (Comm'n App. 1923), aff'd, 113 Tex. 441, 258 S.W. 462, 51 A.L.R. 1 (1924).
- ⁶ *People's Furniture & Appliance Co. v. Healy*, 365 Mich. 522, 113 N.W.2d 802 (1962).
- ⁷ *Epperly v. Johnson*, 734 N.E.2d 1066 (Ind. Ct. App. 2000).
As to constructive fraud, see § 25.

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37 Am. Jur. 2d Fraud and Deceit § 87

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IV. False Representations

C. Matters of Futurity; Promises and Statements of Intention

2. Promises and Statements of Intention

a. In General

§ 87. General rule of nonliability

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[Employer's misrepresentation as to prospect, or duration of, employment as actionable fraud, 24 A.L.R.3d 1412](#)

Subject to certain exceptions and qualifications,¹ the general rule is that mere unfulfilled promises to do a particular thing in the future do not constitute fraud in and of themselves.² Thus, fraud cannot be predicated upon the mere nonperformance of a promise or contractual obligation,³ or upon failure to fulfill an agreement to do something at a future time⁴ or to make good subsequent conditions which have been assured.⁵ Such nonperformance alone has frequently been held not even to constitute evidence of fraud.⁶

Observation:

Reasons given for the rule not permitting predication of fraud on promises that are merely unkept subsequently are that a mere promise to perform an act in the future is not, in a legal sense, a representation⁷ or statement of existing or past fact,⁸ and a person has no right to rely on such a promise or statement.⁹ A mere failure to perform a promise does not change its character.¹⁰ Moreover, a representation that something will be done in the future,¹¹ or a promise to do it,¹² cannot, from its nature, be true or false at the time when it is made. The failure to make it good is merely a breach of contract, which must be remedied by an action on the contract, if at all.¹³

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Footnotes

¹ §§ 89 to 92.

² Hart v. Bayer Corp., 199 F.3d 239 (5th Cir. 2000) (applying Mississippi law); Cook v. Little Caesar Enterprises, Inc., 210 F.3d 653, 2000 FED App. 0147P (6th Cir. 2000) (applying Michigan law); Trade Finance Partners, LLC v. AAR Corp., 573 F.3d 401 (7th Cir. 2009) (applying New York law); Futch v. Lowndes County, 297 Ga. App. 308, 676 S.E.2d 892 (2009); Ira G. Steffy & Son, Inc. v. Citizens Bank of Pennsylvania, 2010 PA Super 175, 7 A.3d 278 (2010), appeal denied, 27 A.3d 1015 (Pa. 2011); Supervalu, Inc. v. Johnson, 276 Va. 356, 666 S.E.2d 335 (2008).

³ OHM Remediation Services Corp. v. Hughes Environmental Systems, Inc., 952 F. Supp. 120 (N.D. N.Y. 1997) (applying New York law); Yield Dynamics, Inc. v. TEA Systems Corp., 154 Cal. App. 4th 547, 66 Cal. Rptr. 3d 1 (6th Dist. 2007), as modified on denial of reh'g, (Sept. 21, 2007); Adams v. G.J. Creel and Sons, Inc., 320 S.C. 274, 465 S.E.2d 84 (1995); Kajima Intern., Inc. v. Formosa Plastics Corp., USA, 15 S.W.3d 289 (Tex. App. Corpus Christi 2000) (noting that otherwise, every breach of contract would amount to fraud).

⁴ Citizens Nat. Bank of Glasgow v. Damron, 286 Ky. 43, 149 S.W.2d 762 (1941); Howard v. Reaume, 310 Mich. 119, 16 N.W.2d 686 (1944); Farmers Union Co-op. Royalty Co. v. Southward, 1938 OK 237, 183 Okla. 402, 82 P.2d 819 (1938).

⁵ Mario's Pizzeria, Inc. v. Federal Sign & Signal Corp., 379 S.W.2d 736 (Ky. 1964); Credit Indus. Co. v. Adams County Lumber & Supply Co., 215 Miss. 282, 60 So. 2d 790 (1952); Alms & Doepke Co. v. Young, 20 Ohio L. Abs. 325, 1935 WL 1910 (Ct. App. 1st Dist. Hamilton County 1935).

⁶ § 490.

⁷ Howard v. Reaume, 310 Mich. 119, 16 N.W.2d 686 (1944); Blow v. Indemnity Ins. Co. of North America, 66 S.W.2d 469 (Tex. Civ. App. Beaumont 1933).

⁸ Citizens Nat. Bank of Glasgow v. Damron, 286 Ky. 43, 149 S.W.2d 762 (1941).

⁹ § 252.

¹⁰ Credit Indus. Co. v. Adams County Lumber & Supply Co., 215 Miss. 282, 60 So. 2d 790 (1952).

¹¹ Colorado Milling & Elevator Co. v. Rapides Grocery Co., 142 So. 626 (La. Ct. App. 2d Cir. 1932); Alms & Doepke Co. v. Young, 20 Ohio L. Abs. 325, 1935 WL 1910 (Ct. App. 1st Dist. Hamilton County 1935).

¹² Turner Elkhorn Coal Co. v. Smith, 239 Ky. 428, 39 S.W.2d 649 (1931); Soble v. Herman, 175 Va. 489, 9 S.E.2d 459 (1940).

¹³ Tom Hughes Marine, Inc. v. American Honda Motor Co., Inc., 219 F.3d 321 (4th Cir. 2000) (applying South Carolina law); Appel v. Hupfield, 198 Md. 374, 84 A.2d 94 (1951).

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C. Matters of Futurity; Promises and Statements of Intention

2. Promises and Statements of Intention

a. In General

§ 88. General rule of nonliability—Illustrative applications

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Pursuant to the rule that mere promissory statements or unkept promises cannot be made the basis of fraud,¹ it has been held that fraud cannot be predicated on:

- promises to make² or to pay³ loans
- promises of employment⁴
- promises involving domestic relations⁵
- a representation by a county medical examiner and a medical research institute, to a putative organ donor's mother, that the institute would take a sample of the putative donor's brain tissue, which representation was made to obtain the mother's consent⁶
- promises concerning the winning of contests⁷
- promises of payment for services upon completion of rendering the service⁸
- promises as to the management of plaintiff's pension plan involving future performance⁹
- promises involving corporate stock¹⁰

Similarly, it has been held that fraud cannot be premised on a statement by a vendor of realty that the vendee will not have to use any money but that the vendor's obligation will be only to resell the lots and turn the proceeds over to the vendor until payment is made;¹¹ on a lessor's promise to a lessee of part of a building that he will not lease all the building to a lessee of another part thereof on the expiration of the promisee's lease unless such other lessee will pay the promisee the price the promisee is demanding from him or her for certain furniture and the promisee's lease interest.¹²

An assertion that one will be indicted for crime and sent to the penitentiary unless a particular thing is done does not amount to fraud,¹³ nor does a declaration that one is going to get out of a company, and that the person to whom the representation is made will be voted out, amount to fraud.¹⁴

On the other hand, deliberately false statements of intention and deliberately fraudulent promises may serve as the basis of a charge of fraud,¹⁵ and this rule is illustrated where—

- a used car dealer falsely promises to obtain liability insurance for a car buyer.¹⁶
- a purchaser of a business falsely represents the intention to take up residence and run the business, but actually represents others who seek dissolution of the business.¹⁷
- a lender's false or reckless misrepresentation that it would provide financing after knowingly permitting the prospective borrower to incur debts or other obligations in reliance thereon.¹⁸

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Footnotes

¹ § 87.

² *Ritchie Capital Management, L.L.C. v. Jeffries*, 653 F.3d 755 (8th Cir. 2011); *Kiser v. Richardson*, 91 Kan. 812, 139 P. 373 (1914).

³ *Ramsey v. Reynierson*, 200 Ky. 624, 255 S.W. 274 (1923).
As to statements regarding credit, solvency, and financial standing, generally, see §§ 184 to 193.

⁴ § 142.

⁵ *Miller v. Miller*, 242 Iowa 706, 46 N.W.2d 732 (1951) (promise by a husband to return an automobile to his wife when a divorce was obtained).
Even if a prospective father-in-law promised a prospective son-in-law that if he married his daughter he would have permanent employment with the father-in-law's company and could take the company over in the future, and the father-in-law did employ the son-in-law after marriage, discharge of the son-in-law after the marriage failed did not constitute fraud. *Kashan v. Best Metropolitan Towel & Linen Supply Co., Inc.*, 51 A.D.2d 730, 379 N.Y.S.2d 140 (2d Dep't 1976).
As to promises to marry, see § 140.

⁶ *Adams v. King County*, 164 Wash. 2d 640, 192 P.3d 891 (2008).

⁷ *Brown v. C.A. Pierce & Co.*, 229 Mass. 44, 118 N.E. 266 (1918) (promise of winning a prize in a voting contest).

⁸ *Hunt v. Lewis*, 87 Vt. 528, 90 A. 578 (1914) (promise to pay attorneys as soon as their services were performed).

⁹ *Stoler v. Metropolitan Life Ins. Co.*, 287 So. 2d 694 (Fla. 3d DCA 1974).

¹⁰ *Campbell v. Eastern Bldg. & Loan Ass'n of New York*, 98 Va. 729, 37 S.E. 350 (1900); *Sweeny v. Sweeny Inv. Co.*, 199 Wash. 135, 90 P.2d 716, 139 A.L.R. 847 (1939).

¹¹ *State Bank of Iowa Falls v. Brown*, 142 Iowa 190, 119 N.W. 81 (1909).
As to promises relating to improvements to property, see §§ 145, 146.
As to statements relating to the value, cost, and income of property, generally, see §§ 170 to 183.

¹² *Rankin v. Burnham*, 150 Wash. 615, 274 P. 98 (1929).

¹³ *Alms & Doepke Co. v. Young*, 20 Ohio L. Abs. 325, 1935 WL 1910 (Ct. App. 1st Dist. Hamilton County 1935); *Kathan v. Comstock*, 140 Wis. 427, 122 N.W. 1044 (1909).

¹⁴ *Boulden v. Stilwell*, 100 Md. 543, 60 A. 609 (1905); *Alms & Doepke Co. v. Young*, 20 Ohio L. Abs. 325, 1935 WL 1910 (Ct. App. 1st Dist. Hamilton County 1935).

¹⁵ § 91.

¹⁶ *Valdez v. Taylor Auto. Co.*, 129 Cal. App. 2d 810, 278 P.2d 91 (2d Dist. 1954).

¹⁷ *Peoples Sav. Bank v. Stoddard*, 359 Mich. 297, 102 N.W.2d 777, 83 A.L.R.2d 344 (1960).

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¹⁸ [Banker's Trust Co. of Western New York v. Steenburn](#), 95 Misc. 2d 967, 409 N.Y.S.2d 51 (Sup 1978), judgment [aff'd](#), 70 A.D.2d 786, 418 N.Y.S.2d 723 (4th Dep't 1979).

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IV. False Representations

C. Matters of Futurity; Promises and Statements of Intention

2. Promises and Statements of Intention

a. In General

§ 89. Assertions of intention or declarations of purpose; distinctions and exceptions

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Trial Strategy

[Lender Liability for Negligent Misrepresentation Made to Business Loan Applicant, 19 Am. Jur. Proof of Facts 3d 477](#)

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 215](#) (Instruction to jury—When false representations concerning intention or state of mind may constitute actionable fraud)

As in the case of promises, it is generally held that mere assertions of intention,¹ or declarations of future purpose,² do not amount to fraud. Some courts, however, draw a distinction between cases where the representation of an intention is in fact a mere promise collateral to the contract and where it amounts to an affirmation of a present state of mind, and they hold that a representation of an intention as existing may, if false, avoid a contract induced thereby, on the ground that the state of a person's mind is a fact and, hence, that a misstatement as to it is a misstatement of fact.³ At any rate, statements relating to a party's intentions are under some circumstances held to be statements as to material existing facts.⁴

CUMULATIVE SUPPLEMENT

Cases:

Under Massachusetts law, employee's allegations regarding misrepresentations allegedly made by his employer failed to state an intentional misrepresentation claim against employer; employee failed to allege that statement regarding employer's future succession plan misrepresented the actual intention of employer at the time it was made, as required to support a misrepresentation claim based on a statement of future intention, and employee failed to sufficiently allege that employer's alleged promise to formalize long-term incentive plan and its failure to offer note and mortgage in connection with home loan caused him any harm. [Robert Reiser & Company v. Scriven](#), 130 F. Supp. 3d 488 (D. Mass. 2015).

[END OF SUPPLEMENT]

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Footnotes

- ¹ [Riley v. Byrne](#), 145 Mont. 138, 399 P.2d 980 (1965); [Lanz v. Naddy](#), 82 N.W.2d 809 (N.D. 1957); [Orion Refining Corp. v. UOP](#), 259 S.W.3d 749 (Tex. App. Houston 1st Dist. 2007) (applying Illinois law).
- ² [Colorado Milling & Elevator Co. v. Rapides Grocery Co.](#), 142 So. 626 (La. Ct. App. 2d Cir. 1932); [Boulden v. Stilwell](#), 100 Md. 543, 60 A. 609 (1905); [Rankin v. Burnham](#), 150 Wash. 615, 274 P. 98 (1929).
- ³ [99 Pratt St. Corp. v. Stand Realty Corp.](#), 27 Conn. Supp. 101, 230 A.2d 613 (Super. Ct. 1966); [Thieman v. Thieman](#), 218 S.W.2d 580 (Mo. 1949); [Adams v. Clark](#), 239 N.Y. 403, 146 N.E. 642 (1925); [Bryant v. Bruner](#), 593 S.W.2d 358 (Tex. Civ. App. Texarkana 1979).
- ⁴ §§ 90, 91.

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37 Am. Jur. 2d Fraud and Deceit § 90

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Fraud and Deceit

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IV. False Representations

C. Matters of Futurity; Promises and Statements of Intention

2. Promises and Statements of Intention

a. In General

§ 90. Misrepresentation of existing state of mind or present intent

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

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A.L.R. Library

[Employer's misrepresentation as to prospect, or duration of, employment as actionable fraud, 24 A.L.R.3d 1412](#)

Trial Strategy

[Promise Made with Intent not to Perform, 5 Am. Jur. Proof of Facts 2d 727](#)

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 215](#) (Instruction to jury—When false representations concerning intention or state of mind may constitute actionable fraud)

An existing purpose or state of mind may be misrepresented and thus constitute a misrepresentation of fact.¹ Most courts hold that if the falsity of the statement can be established, a misrepresentation of intent is an actionable misrepresentation of fact.²

CUMULATIVE SUPPLEMENT

Cases:

Employer's alleged misrepresentation to prospective employee that position involved managing employer's existing workload, not procuring clients, was a statement of present fact, not expression of future expectations, and thus was sufficient to support a fraudulent inducement claim. [Laduzinski v. Alvarez & Marsal Taxand LLC](#), 16 N.Y.S.3d 229, 2015 WL 5008378 (App. Div. 1st Dep't 2015).

[END OF SUPPLEMENT]

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Footnotes

¹ [Perimeter Realty v. GAPI, Inc.](#), 243 Ga. App. 584, 533 S.E.2d 136 (2000); [Connor v. Bruce](#), 983 S.W.2d 625 (Mo. Ct. App. S.D. 1999); [Adams v. Clark](#), 239 N.Y. 403, 146 N.E. 642 (1925); [Maulding v. Niemeyer](#), 241 S.W.2d 733 (Tex. Civ. App. El Paso 1951).

² [Major v. Christian County Livestock Market, Inc.](#), 300 S.W.2d 246 (Ky. 1957); [Thieman v. Thieman](#), 218 S.W.2d 580 (Mo. 1949); [Roberts v. James](#), 83 N.J.L. 492, 85 A. 244 (N.J. Ct. Err. & App. 1912); [Kritzer v. Moffat](#), 136 Wash. 410, 240 P. 355, 44 A.L.R. 681 (1925).